Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

HARBERT/LUMMUS AGRIFUELS PROJECTS, HARBERT INTERNATIONAL, INC., ABB LUMMUS CREST, INC. and LUMMUS CREST, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the United States Government may retain the benefits received from a private party's performance of an oral contract with the Government, which is later found to be unauthorized, without making compensation therefor.

LIST OF PARTIES

The parties to the proceedings below were Petitioners Harbert/Lummus Agrifuels Projects, a joint venture, Harbert International, Inc., joint venturer, ABB Lummus Crest, Inc., formerly Lummus Crest, Inc., joint venturer, (hereinafter collectively referred to as "Harbert/Lummus"), and Defendant the United States.

RULE 29.6 DISCLOSURE

Petitioners refer to the Certificate of Interest filed with their Petition for Rehearing and Suggestion of Rehearing In Banc from Opinion and Judgment Entered April 21, 1998. Petitioner Harbert/Lummus Agrifuels Projects is a joint venture comprised of Harbert International, Inc., joint venturer, and ABB Lummus Crest, Inc., formerly Lummus Crest, Inc., joint venturer. ABB Lummus Crest, Inc.'s parent companies, non wholly-owned subsidiaries and affiliates include: ABB AB, a Swedish company, and ABB AG, a Swiss company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 21, 1998, in order to resolve the conflict between this Court and the Federal Circuit and between the Federal Circuit and the Third, Ninth and District of Columbia Circuits on the important issues presented herein.

OPINIONS BELOW

On August 30, 1996, the United States Court of Federal Claims issued an opinion in the instant proceeding. The Court of Federal Claims opinion is reported at 36 Fed. Cl. 494 (1996), and is reprinted in the Appendix to this petition at App. 1-61. On April 21, 1998, the Federal Circuit reversed the lower court. The Federal Circuit opinion is reported at 142 F.3d 1429 (Fed. Cir. 1998), and is reprinted in the Appendix to this petition at App. 62-74. By order dated July 27, 1998, the Federal Circuit denied Harbert/Lummus's timely-filed petition for rehearing and suggestion of rehearing *en banc*. This order is also reprinted in the Appendix to this petition at App. 75-76.

JURISDICTION

On April 21, 1998, the United States Court of Appeals for the Federal Circuit reversed the judgment of the

United States Court of Federal Claims in favor of Petitioners, Harbert/Lummus, on the issue of whether the United States had entered into a binding, unilateral contract with Harbert/Lummus to continue to guarantee funding for the Agrifuels project then being constructed by Petitioners. Petitioners thereupon timely filed a petition for rehearing and suggestion of rehearing *en banc*. On July 27, 1998, the Federal Circuit issued an order denying the petition. Pursuant to Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States, Harbert/Lummus has filed this petition for writ of certiorari within ninety (90) days of the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

The Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. §§ 8801-8871 (1994) ("BEA"), created the Alcohol Fuels Program to encourage the construction of alternative fuel energy plants. The BEA created the DOE Office of Alcohol Fuels to administer the Program, and vested the Office with the power to issue government loan guarantees for up to ninety (90) percent of the construction costs. Pursuant to the BEA guarantee provisions, the Government entered into the original loan guarantee agreement and loan servicing agreement with Agrifuels. App. 3.

STATEMENT OF THE CASE

Facts Material to Question Presented

In 1985, the Department of Energy ("DOE") provided a 90 percent guaranty of loans by a consortium of banks to provide construction funding for an ethanol plant to be built in New Iberia, Louisiana, by Agrifuels Refining Corp. ("Agrifuels"). App. 4, 119-20, 151-52. DOE provided this guaranty pursuant to the provisions of the Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. §§ 8801-8871 ("BEA"). App. 3. The collateral for the loans guaranteed by DOE was the ethanol plant to be built by Harbert/Lummus pursuant to a construction contract with Agrifuels. App. 4-5, 119.

The DOE Contracting Officer for the project acted pursuant to a series of delegations of authority[1] from the

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[1] The first of such delegation was from then Secretary of Energy James B. Edwards to Bill Heffelfinger, the Assistant Secretary of Management and Administration. App. 14-15, 92-97, 140-41. Assistant Secretary Heffelfinger then redelegated this authority to Hillary Rauch, the then Director of Procurement and Assistant Management. App. 15, 98-101, 141-42. Subsequent to this delegation, on December 8, 1982, Rauch and Joseph J. Tribble, the Acting Director of Alcohol Fuels, formally redelegated this authority to David Newman, the Director of Procurement Operations. App. 15, 101-08, 142-43. This formal delegation empowered Newman to "enter into, approve, and take such other action as may be necessary and appropriate with respect to any contractual arrangement . . . committing the Department of Energy to (i) the expenditure of public funds." *Id.* This authority was limited to liability involving those actions in which the Government spent $50 million or less and excluded so-called "extraordinary actions." *Id.*

Secretary of Energy through the DOE hierarchy. App. 14-15, 153-55. On September 25, 1985, David Newman, the Director of Procurement Operations, delegated his general authority to administer certain aspects of the loan guarantee program to the then Contracting Officer Steve Michelson. App. 19, 108-10, 143-44. Mr. Michelson's authority included the power to commit the DOE to the expenditure of $25 million. *Id.* In early October 1986, Thomas Keefe replaced Michelson as the Contracting Officer. App. 24, 91, 121, 125. Keefe was delegated the authority "to approve, execute, enter into, modify, administer, close out, terminate and take any other necessary and appropriate action with respect to the Financial Incentive Awards on behalf of the Department of Energy without prior written approval of or further delegation being necessary from the Director, Office of Procurement Operations" for actions valued at $50 million or less. App. 56-57, 111-13, 145. Keefe's authority allowed him "to make all required determinations and decisions, except those that are specifically to be made by other authorities." *Id.* The trial court found that Keefe's express delegation of authority included the authority to take such actions as necessary to protect the collateral for the guaranteed loans, or any other action which would limit the DOE's potential liability on the guaranty. App. 57, 101-02.

During the latter stages of construction, the Government became concerned about Agrifuels' financial stability and stopped approving monthly loan disbursements. App. 27, 122. During a meeting held on February 24, 1987, Harbert/Lummus put the project participants, including Keefe and Beckman, the Deputy Director of the Program Office, on notice that it would terminate the

Engineering Procurement and Construction contract for default if it did not receive timely payments. App. 122-23. Mr. Wohadlo, a senior executive of Harbert International, Inc., testified that they told the group "that the plant was rapidly getting finished and that not only weren't we getting paid for that progress, but payments on the base contract progress were not being made." App. 126. Wohadlo testified that Beckman stated to Harbert/Lummus that if Harbert/Lummus would continue construction, DOE would commit to funding the project to completion, and that Keefe was present at the time of Beckman's statement and had on other occasions made the same promise to him. App. 30-31, 127-28, 132. DOE's cost-benefit analyses illustrate that DOE considered completion of the plant to decrease DOE's potential liability under the guaranty because of the enhanced salvage value of the plant, which was the only collateral available to DOE on the loans it had guaranteed. App. 77-85. Mr. Beckman testified that DOE had a paramount interest in protecting its collateral in the plant. App. 149-50.

The trial court found that Keefe was present when Beckman promised to continue funding if Harbert/Lummus continued construction, and that Keefe "acquiesced" in Beckman's promise to continue DOE's guarantee of construction funds. App. 31, 56 fn. 67. Beckman confirmed in his testimony that his and Keefe's position from before the time of the February 24, 1987, meeting up until the project was terminated was that from DOE's perspective the value of completing the plant was more than the expected cost of completing it and that their intention was to complete the plant. App. 146-47, 150-52. Harbert/Lummus stated that but for the assurances that DOE would continue to guarantee funding, it would have

stopped work immediately for failure to receive payment. App. 31, 44, 135. Based on the 21 month payment schedule, Harbert/Lummus was owed $4.2 million at the time of the meeting. App. 32, 86-90.

At Wohadlo's request, the parties agreed to meet again on April 9, 1987, to discuss the future of the project. App. 38-39, 128, 136-37. Keefe's notes from a meeting between Keefe, Beckman, and Under Secretary of Energy Joseph Salgado held just prior to April 9, 1987, state that "DOE was proceeding on the understanding that the Secretary had decided to continue the project." App. 39, 146-47. During the April 9 meeting, Beckman was called away to meet with Under Secretary Salgado. App. 40, 129. Salgado informed Beckman at that point that the Secretary had decided to withdraw DOE's guarantee of the Agrifuels construction financing. *Id.* Upon his return to the meeting, Beckman informed the representatives from Harbert/Lummus and Agrifuels for the first time that the Secretary of Energy had decided to "discontinue the funding guarantee." App. 40, 123-24, 147-49. Beckman could not provide an answer concerning the status of the payments owed to Harbert/Lummus. App. 40. The trial court found that Harbert/Lummus had practically completed the plant when the Secretary of Energy unexpectedly withdrew the DOE loan guarantee. App. 41-42, 116-18, 137-38, 148-49. In fact, in its April Status Report on the Agrifuels Project, DOE concluded that the plant was "essentially mechanically complete." App. 82-83. The operational staff were in place and the plant had been producing ethanol since March 1987. App. 41-42, 114-15, 133-34, 137-38. In undisputed testimony Mr. Brabham of Harbert/Lummus stated that the plant would have met acceptance test requirements by April 30, 1987. App. 42,

138-39. Although the construction monitor certified that the plant was 99.039% complete, "Agrifuels never paid [Harbert/Lummus] for work done in February, March, or April 1987." App. 43-44, 130-31. The Government likewise refused to pay Petitioners Harbert/Lummus for their construction services performed during this time frame.

Proceedings Below

On April 8, 1993, Harbert/Lummus brought suit against the United States for breach of contract, alleging that the Government's failure to make payment breached an oral agreement with Harbert/Lummus, made or ratified by DOE Contracting Officer Keefe, that the Government would continue to guarantee funding through project completion. Harbert/Lummus asserted that the oral promise made by the Government at the February 24, 1987 meeting was intended to, and did in fact, induce performance on the part of Harbert/Lummus for which compensation is due and owing. In its August 30, 1996 Order, the United States Court of Federal Claims held that on or about February 24, 1987, the representations and conduct of DOE Contracting Officer Keefe created a binding unilateral contract by DOE to continue to guarantee construction financing in return for continued progress by Harbert/Lummus toward project completion. 36 Fed. Cl. 494, 511, 513 (1996); App. 45, 49-50. The court further held that DOE's unilateral decision to withdraw that guaranty on or about April 9, 1987 constituted a breach of contract for which DOE was liable. *Id.* at 515; App. 55. The court relied on the long-standing principle that "a contractual relationship arises between the Government and a private party if promissory words of the

former induce significant action by the latter in reliance thereon." *Id.* at 513 (citations omitted); App. 50. The court specifically found that:

> . . . [D]uring the February 24 meeting, Beckman stated that DOE was committed to "funding" the project through completion if the Joint Venture did not follow through on its threat to walk off the job. The court has also found that Keefe was present when that statement was made. It finds here that Keefe's silence amounted to an adoption of Beckman's statement. It is also clear that Beckman, and thus Keefe, intended Harbert/Lummus to act on the representation, and that Harbert/Lummus relied on it. The court believes Wohadlo's and Hamilton's testimony that, in the absence of Beckman's assurance, the Joint Venture would have quit work altogether. Harbert/Lummus thus accepted DOE's unilateral offer and simultaneously gave valuable consideration by staying on the job.

Id.; App. 49-50. The Court of Federal Claims further held:

> The question thus becomes, did the agency commit itself to answer to Harbert/Lummus in contract damages even if DOE's refusal to guarantee further loans was a legitimate exercise of its rights against Agrifuels under the guarantee agreement? Or, to state it differently, could the Government create a side-bar agreement with Harbert/Lummus independent of its rights to default Agrifuels? The court holds that it could and did. The court is persuaded that a promise to the Joint Venture not to suspend the guarantee can be enforced independently of DOE's rights against Agrifuels. DOE was under

> no prior obligation to make such an independent commitment directly to the construction contractor, with whom it had had no prior contractual relationship. The statement was obviously made for the sole purpose of trying to salvage the entire project. Beckman's and Keefe's words were intended to induce Harbert/Lummus to continue working, and they did. The court views these facts as analogous to those in *United States v. Winstar Corp., et al.*, ___ U.S. ___, 116 S. Ct. 2432, 135 L.Ed.2d 964 (1996), where the Court found that, although the Government had not contracted away its sovereign powers, it had obligated itself to answer in damages in the event it acted inconsistently with binding promises. Here, DOE retained the power to exercise its rights against Agrifuels, but it promised Harbert/Lummus that, if the agency did so, it would compensate the Joint Venture for any detrimental reliance.

Id. at 514-15; App. 53-54. Although the court found that the burden was on Harbert/Lummus to prove that Keefe had the authority to make the offer, the court held that Harbert/Lummus had met that burden, stating: "Under Keefe's general powers, he would have the authority to enter into an agreement, the intent of which was to protect DOE's existing financial exposure by bringing the project to completion." *Id.* at 515-16; App. 55-57. On the question of damages, the court held that "DOE is liable to Harbert/Lummus for the value of the additional work performed in reliance on the broken promise." *Id.* at 515; App. 55. In a separate order, dated December 19, 1996, the court ordered the payment of damages, plus interest, flowing from DOE's breach of its promise to Harbert/

Lummus to continue to guarantee construction financing. App. 156-61.

The United States appealed the Court of Federal Claims' judgment to the United States Court of Appeals for the Federal Circuit. On April 21, 1998, the Federal Circuit reversed the Court of Federal Claims by holding that Keefe, the DOE Contracting Officer ("CO"), did not have authority to bind the Government to an oral contract to guarantee funding because his delegation of authority expressly required his "prior, written approval." 142 F.3d 1429, 1432 (Fed. Cir. 1998); App. 68. The court stated: "Because there is no evidence of such prior, written approval by the CO of the unilateral contract, we hold that the CO lacked the authority to enter into the oral contract and it is therefore not binding upon the government." *Id.* at 1433; App. 70. The Federal Circuit found that the Government was not contractually bound or otherwise obligated to compensate Harbert/Lummus for the goods and services conferred on the Government in performance of the contract because (1) Keefe did not document the Government's promise in writing, and moreover, (2) Keefe did not ratify the promise made by Beckman. *Id.* at 1432-34; App. 67-73. The court also relied on the same writing requirement in the CO's delegation of authority to refute ratification, stating: "In addition, as previously discussed, the CO's delegation of authority expressly provided that even a ratification by the CO would have to be in writing. In the absence of such a writing, the CO could not have properly demonstrated his acceptance of the contract." *Id.* at 1434; App. 72. Thereupon, the court held: "Because we find that the government is not bound by this oral contract to guarantee funding of the project to completion, we reverse the

decision of the trial court that there was such a contract and we vacate the trial court's damages award with respect to this alleged contract." *Id.*; App. 72. On May 20, 1998, Petitioners Harbert/Lummus timely filed a petition for rehearing and suggestion of rehearing *en banc*. The Federal Circuit denied their petition on July 27, 1998.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S OPINION CONTRADICTS SUPREME COURT PRECEDENT IN *CLARK V. UNITED STATES* WHICH PROVIDES FOR QUANTUM MERUIT RECOVERY IN SIMILAR CIRCUMSTANCES.

Certiorari is appropriate here because the decision below contradicts Supreme Court precedent and over a century of federal government contract jurisprudence. In 1877, this Court recognized that even though a contract was not in writing as required by an Act of Congress, the party contracting with the Government should recover the fair value of the property or services it conferred where a parol contract is found to exist and has been wholly or partially performed by that party. *See Clark v. United States*, 95 U.S. 539 (1877). Specifically, the Court held: "[W]e think that [the party performing] will be entitled to recover such value as upon an implied contract for a *quantum meruit*." *Id.* at 542. The Court noted that the statute involved required that all contracts with the United States be in writing, and further noted that the statute made it "unlawful for contracting officers to make contracts in any other way than by writing signed by the parties." *Id.* Despite this statutory writing requirement

placed on government contracts, the Court found the oral contract for the use of a steam boat to be an implied-in-fact contract with the Government, warranting reimbursement for the value of the goods or services conferred and received.

Moreover, the *Clark* case supports the general proposition that regardless of the nature of the infirmity in the formation of the contract, the Government may not reap the benefits of the other party's performance and then refuse payment.[2] *See id.* The present situation is analogous to that in the *Clark* case. Here, as in *Clark*, the Government made a promise to pay Petitioners, but later reneged on its promise after Petitioners had already performed their side of the bargain and conferred a benefit on the Government. As held in *Clark*, the United States government may be liable when it induces action on the part of another and later reneges on the promise which induced the action taken in reliance thereon. To hold otherwise would contradict the decisions of this Court and run afoul of ordinary principles of equity and justice. Applying these principles, the Government is precluded from retaining the benefits conferred on it by the performing party while refusing to make payment or compensation therefor on the ground that the government contract or promise which induced the performance was unauthorized. The Government is obligated to pay or reimburse the performing party for the value of the

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[2] Similarly, in *Crocker v. United States*, this Court held that the fact that the government contract was found to be tainted with fraud and rescinded did not preclude recovery for the value of the goods already provided thereunder. 240 U.S. 74, 81 (1916) (citing *Clark*, 95 U.S. at 543).

goods and services received; such compensation should not be denied for lack of a written contract or ratification.

In the present case, the trial court's unchallenged findings establish that an implied-in-fact contract was created when Harbert/Lummus was induced to and, in fact, did perform the services that were the subject of the Government's oral promise.[3] On these grounds, the trial court ordered the Government to pay damages to Harbert/Lummus based on the value of the benefits received as a result of the inducement. In reversing the United States Court of Federal Claims, the Federal Circuit narrowly focused on the issues of (1) whether the promise made by the Government was documented in writing and (2) whether the contracting officer affirmatively ratified a promise that the trial court found that he "acquiesced" in and "adopted." The Court of Appeals for the Federal Circuit concluded that the Government's admitted promise[4] to continue guaranteeing loans through the

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[3] Moreover, Keefe's (the CO) delegation of authority did not require a written agreement; it required that he give prior, written approval of his own action. Petitioners would not know that the CO's promise had or had not been approved in writing, and DOE acquisition regulations in effect at the time of performance expressly required the DOE CO to advise the other party if its performance is pursuant to an unauthorized promise. App. 162-64. 48 C.F.R. § 901.602-3 (1995) ("Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitment, the Contracting Officer shall advise that person that the work is unauthorized and performance is at the person's own risk."). DOE never advised Harbert/Lummus of any lack of authority in this case.

[4] The Government does not challenge on appeal the findings of the Court of Federal Claims relative to the promise made by DOE.

completion of the Agrifuels Project was unauthorized and that any recovery by Harbert/Lummus for the goods and services or other benefits it conferred on the Government in reliance on that promise was precluded. In so holding, the Court of Appeals disregarded Supreme Court precedent allowing for recovery in quantum meruit in such situations.

II. THE FEDERAL CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL WHICH HOLD THAT A GOVERNMENT PROMISE IS NOT NECESSARILY INVALID FOR LACK OF A WRITING DESPITE A WRITING REQUIREMENT IN THE GOVERNING STATUTE OR REGULATION.

Certiorari is appropriate here because the decision below directly conflicts with decisions of other Circuit Courts of Appeal. Most recently, the Ninth Circuit held in *PacOrd, Inc. v. United States* that an oral promise by the Government to guarantee payment to a subcontractor was not necessarily invalid and unenforceable merely because the Government failed to reduce the promise to writing as required by the governing statute or regulation. 139 F.3d 1320, 1322-23 (9th Cir. 1998). The *PacOrd* court found that the Government contracting officer's oral promise to PacOrd, the subcontractor, that the Government would guarantee payment by the contractor, may have created an enforceable implied-in-fact contract (to be proven at trial) warranting recovery despite the writing requirement in the Federal Acquisition Regulation ("FAR"). *See id.* Relying on the Court of Claims decision in *Narva Harris Constr. Corp. v. United States*, 574

F.2d 508, 510-11 (Ct. Cl. 1978), which cites this Court's decision in *Clark*, the Ninth Circuit observed: "Implied-in-fact contracts with the government have been enforced despite statutory or regulatory requirements that contracts be in writing." *Id.* at 1322. The court went on:

> The present case is analogous to *Narva Harris*. In both cases the government made assurances to a service provider in order to secure the desired performance. In neither case did the parties execute written contracts as required. And, PacOrd, like Narva Harris Construction, proceeded and completed its work in reliance on the government's assurances.
>
> Thus, PacOrd, like Narva Harris Construction, should be permitted to establish at trial, the existence of an implied-in-fact contract. If PacOrd can do so, recovery is not barred by the FAR requirement that the contract must be in writing.

Id. at 1323.

Therefore, as in *PacOrd*, a writing requirement should not serve to preclude enforcement of or compensation under an implied-in-fact contract found to have been formed by the trial court. Applying this reasoning to the case at hand, it appears that neither the Government's promise nor the CO's ratification need be in writing to effectively bind the Government. The Federal Circuit's reliance upon the absence of a writing documenting the oral agreement between Petitioners and the Government as the basis for reversing the trial court directly conflicts with the Ninth Circuit's opinion in *PacOrd*.

The decision of the Federal Circuit is also in conflict with the decisions of the Third Circuit in *Inter-Island Transport Line, Inc. v. Government of the Virgin Islands*, 539 F.2d 322, 328-29 (3rd Cir. 1976) ("[E]ven if the Government did not comply with its own statutory procurement procedures, Inter-Island is entitled to recover the fair value of its water hauling services according to long-established principles.") (citing *Clark*, 95 U.S. at 542); and the District of Columbia Circuit in *Blake Constr. Co. v. United States*, 296 F.2d 393, 396 (D.C. Cir. 1961).

In *Blake*, the Government argued that a contract entered into between the General Services Administration and a construction contractor was a nullity because it violated a prohibition on cost plus a percentage contract under the Federal Property and Administrative Services Act of 1949. *See* 296 F.2d at 396. The Court of Appeals for the District of Columbia acknowledged the rule that "one is charged with knowledge of the extent of the actual authority of the government's contracting agent," but explained that "[i]f in fact the contract was made without authority, then perhaps no contract exists, but the contractor is nonetheless entitled to the reasonable value of the benefits conferred."[5] *Id.*

The decision of the Federal Circuit below could not be more at odds with the principle, universally accepted by other circuits, that the Government may not accept the benefits arising from an unauthorized contract without

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[5] *See also Gamewell Co. v. City of Phoenix*, 216 F.2d 928, 940 (9th Cir. 1954), *amended* 219 F.2d 180 (9th Cir. 1955); *Independent Paving Co. v. City of Bay St. Louis*, 74 F.2d 961, 963-64 (5th Cir. 1935).

paying for them. The conflict among the circuits regarding the legitimacy of the Government's refusal to pay for benefits it receives as a result of unauthorized promises warrants a grant of certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

HARBERT/LUMMUS, et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 93-207C.

United States Court of Federal Claims.

Aug. 30, 1996.

Edward S. Allen, Birmingham, AL, for plaintiffs. M. Stanford Blanton, Lee Ann Pounds, and Lisa J. Sharp, of counsel.

Mark A. Melnick, with whom were Assistant Attorney General Frank W. Hunger and David M. Cohen, Washington, DC, for defendant. I. Avrum Fingeret, Department of Energy, of counsel.

OPINION

BRUGGINK, Judge.

This is an action for breach of contract. Plaintiff[1] alleges that the United States, acting through the Department of Energy (DOE), breached express oral contracts and one express or implied-in-fact oral contract.[2] Trial

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[1] Harbert/Lummus, a joint venture of Harbert International Inc. and Lummus Crest Inc., will be treated as a single plaintiff for purposes of this case. Lummus was a subsidiary of Combustion Engineering, Inc. Throughout the opinion the plaintiff will be referred to as either "Harbert/Lummus" or "the Joint Venture."

[2] Plaintiff seeks $15,723,830.

was held April 15-19, 1996, in Birmingham, Alabama.[3] For the reasons set forth below, the court finds that an express oral contract to guarantee the funding of the project to completion was formed between the plaintiff and DOE.

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[3] On December 22, 1994, this court denied cross motions for summary judgment in this case ruling that certain material facts were still at issue. *Harbert/Lummus, et. al. v. United States,* No. 93-207C (December 22, 1994). These issues were identified as:

> Whether any authorized DOE official promised to approve the revision of the Disbursement Schedule in the EPC Agreement from twenty-one to eighteen months, provided that the construction monitor certified that the Construction Schedule was being so accelerated? Whether any authorized DOE official ratified such a promise? Whether Harbert/Lummus informed the DOE of its belief that such an agreement had been reached? Whether the DOE failed to correct any misunderstandings concerning an accelerated schedule which it knew were possessed by Harbert/Lummus? Whether an authorized official of the DOE promised to continue its guarantee of the funding for the Agrifuels Project as an inducement to have Harbert/Lummus complete the Project? Whether Michelson or other DOE officials had been delegated sufficient authority to bind the Government to an agreement to amend the Disbursement Schedule and to continue to support the project to completion? Whether the DOE possessed the approval authority over the terms and conditions of the EPC Agreement as a condition of the Guarantee Agreement.

Id.

FACTUAL BACKGROUND

In response to the oil crisis in the late 1970's, the Federal Government began investigating alternative sources of energy. As a result, Congress passed the Energy Security Act,[4] which established different mechanisms for the public and private sector to develop alternative sources of fuel. One of these mechanisms, set out in the Biomass Energy and Alcohol Fuels Act of 1980 ("the Act"),[5] was the Alcohol Fuels Program ("Program"). The Program was designed to encourage private companies to design and build alternative fuel energy plants. The Act created an Office of Alcohol Fuels ("Program Office") within the DOE to implement and administer the Program.[6] 42 U.S.C. § 8820 (1988).

Specificaliy, the Act vested the Program Office with the power to issue government loan guarantees for up to 90 percent of the cost of construction of ethanol and other alternative fuel plants. 42 U.S.C. § 8814(b)(1) (1988). By issuing loan guarantees, the Government hoped that banks would be more willing to lend the capital needed to complete the experimental plants. Approximately forty applications were initially received by the Program Office. This number was then culled to fifteen. Of these, seven received conditional commitments for loan guarantees.

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[4] Pub.L. No. 96-294, 94 Stat. 611 (June 30, 1980).

[5] The Biomass Energy Act was established by section 201 of the Energy Security Act.

[6] Three entities within the DOE had oversight power on the alternative fuels program. These were, the Program Office, the Procurement Office and the Office of the General Counsel.

One of these conditional commitments went to Agrifuels Refining Corporation ("Agrifuels").[7] Agrifuels was a wholly owned subsidiary of Edgington Oil Company, Inc., which, in turn was owned by Triad Energy Corporation.[8] Agrifuels had attempted to build an alcohol fuels plant on its own, prior to the passage of the Biomass Act, but could not obtain adequate financing. After receiving the conditional commitment, Agrifuels began looking for a contractor to perform the actual construction. The plant was to be located in New Iberia, Louisiana, and was to convert sugar cane into 100,000 gallons of ethanol per day, which could then be added to gasoline.[9] Agrifuels contacted Harbert/Lummus in the hope that the Joint Venture would take on the actual construction of the facility. Harbert/Lummus had worked on a similar plant in Tennessee and therefore had experience in construction of alternative fuel plants.[10] Harbert/Lummus submitted a bid to Agrifuels in December, 1984, for $67.5 million.

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[7] Ultimately, only three of the conditional commitments resulted in actual loan guarantees. In addition to the Agrifuels project, DOE guaranteed funding for the New Energy Company of Indiana project and for the Ten-Al project in Tennessee.

[8] Triad was owned by Newedge Energy Corporation. Edgington, Triad and Newedge were collectively known as the Triad Group.

[9] Agrifuels hoped to make $35 million per year in gross proceeds from the refining plant.

[10] The plant in Tennessee, Ten-Al, was also backed by DOE loan guarantees and administered by the Office of Alcohol Fuels.

Negotiations began between Agrifuels, DOE, and several banks to work out the details of the loan guarantee. The conditional commitment of the loan guarantee was due to expire on April 30, 1984.[11] The negotiation process was very complex, with Agrifuels having to complete several agreements, the most important of which were: an Engineering Procurement and Construction ("EPC") agreement with Harbert/Lummus for the construction of the project; a loan guarantee agreement between Agrifuels, DOE, and the lending banks[12]; and a loan servicing agreement between Agrifuels, DOE, and Hibernia National Bank ("Hibernia"), the servicing bank. During the negotiations Agrifuels was represented by its president Patrick Hamilton, the Joint Venture was represented by Leonard Wohadlo, the president of Harbert International, and Bobby Brabham, a technical representative for the Joint Venture. DOE was represented by the contracting officer Stephen J. Michelson, who was also Director of the Financial Incentives Operations Division, Daniel Beckman, the Deputy Director of the Program Office, and Doug Mitchell, a DOE attorney. The banks

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[11] As the negotiations continued and the deadline approached, Congress extended the conditional commitment deadline from April 30, to September 30, 1984.

[12] The lending banks included the Bank of New England N.A., Bank Fuer Gemeinwirtschaft AG, Bank of Scotland, Creditanstalt-Bankverein, The Golden State Sanwa Bank, Hibernia National Bank in New Orleans, and the Yasuda Trust and Banking Co., LTD.

were represented by James L. Croyle from the Bank of New England ("BNE").[13]

Agrifuels and the Joint Venture negotiated the construction contract. Nevertheless, Agrifuels kept DOE informed of the negotiations because under the terms of the conditional commitment DOE had veto power over the content of the EPC agreement.[14] One of the early sticking points was the method of payment to the construction contractor.[15] The Joint Venture wanted payment in advance of construction but DOE would only authorize payment in arrears. Finally, on July 17, 1984, Hamilton sent a letter to Michelson informing him that the Joint Venture had agreed to payment in arrears.

The various agreements were all interrelated. The payment schedule for the construction contract was built into and controlled by the Milestone and Disbursement Schedule ("MDS") which was contained in the Servicing Agreement that was to be executed among the banks,

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[13] The Bank of New England served as the agent bank for all the other banks.

[14] In addition, section 22.2 of the EPC gave DOE a security interest in the EPC such that DOE could step into the shoes of Agrifuels as the owner and direct the contractor to act as if DOE was a party to the EPC agreement.

[15] Another early problem faced by Agrifuels was a lawsuit filed by the Archer Daniel Midlands Company ("ADM") against the State of Louisiana. ADM argued on equal protection grounds that the tax exemption granted Agrifuels by the State for building the plant amounted to unfair protection of Agrifuels. DOE said the project could not go forward until the court ruled on the equal protection issue. Instead, Louisiana passed new legislation changing Agrifuels tax exemption to a tax incentive, thus making it available to others.

DOE, and Agrifuels. The Joint Venture would not be a signatory to that agreement.[16]

The EPC contained a Construction Progress and Payment Schedule ("CPPS") which the contractor had to follow. This schedule mirrored the MDS. Both of these schedules called for a 21 month work and payment schedule. Harbert/Lummus wanted a change to the CPPS in order to work and get paid on an 18 month schedule. DOE, however, wanted a clause put into the EPC that would penalize the Joint Venture if the contractor failed to complete the project on time.[17] DOE would not have accepted the EPC if the penalty clause was not included. Wohadlo said the Joint Venture would only agree to the penalty clause if the EPC also included a bonus provision for early completion. DOE agreed and the EPC allowed for a bonus of $40,000 per day for every day the project was completed earlier than 21 months. The bonus was capped at $3.6 million, however. The bonus payment was to come from the savings on interest that would be avoided by completing the project earlier. DOE agreed to

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[16] The MDS is located in Appendix A to the Servicing Agreement. The Servicing Agreement was signed by the Department of Energy, Agrifuels, and the lending banks, including the agent bank, Bank of New England, and the servicing bank, Hibernia National Bank in New Orleans. The Construction Progress and Payment Schedule and the Construction Work Breakdown Schedule for the contractor were part of the EPC. The only parties to the EPC were Agrifuels and Harbert/Lummus.

[17] Michelson testified that it was actually the banks that had wanted the penalty clause inserted into the contract although DOE may have had a common interest in its insertion.

the bonus because it believed early completion would save money in the long run.

At this point, the Joint Venture also raised the issue of shortening the CPPS and MDS from 21 to 18 months.[18] While the 21 month schedule had been established early on during negotiations, Harbert/Lummus believed that it could build the plant safely and efficiently in 18 rather than 21 months and wanted to be paid on an eighteen month schedule. The Joint Venture was concerned that a 21 month schedule would leave it with a negative cash flow. DOE was not willing to change the schedule because of its concern that the contractor would get paid too early and then might not finish the plant in a timely manner.

Hamilton believed that the change from the 21 to an 18 month schedule would not lead to an increase in contract price and would in fact lead to interest and administrative cost savings.[19] DOE later estimated that the change from a 21 to an 18 month schedule would lead

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[18] For ease of reference, because of their interrelationship, all changes to the CPPS sought by Harbert/Lummus and all changes to the MDS sought by Agrifuels will be referred to as changes to the MDS.

[19] If the MDS had been amended to 18 months and the contractor had in fact finished within 18 months it would still receive the bonus payment. The contract provided that work would not be paid for until it was completed. Therefore, if the contractor finished in 19 months, it would receive a 2 month bonus, but would not receive the full final payment in month 18. If the contractor took 21 months to complete the project, the contract funds would still be paid in 18 installments, but over 21 months, instead of 18.

to a $2.5 million cost savings, even after a bonus payment to the Joint Venture for early completion.

Harbert/Lummus had to negotiate this change with Agrifuels, not DOE, because the Joint Venture was not a party to any agreements with DOE. Before Agrifuels would amend the CPPS, however, it wanted the MDS revised so it could apply for guaranteed funds from the bank group on an 18 month schedule. Even though the Joint Venture was the entity seeking the revision, it was only a party to the EPC, not the MDS. A change to the CPPS, therefore, depended on a change to the MDS. Thus, the change order request had to come from Agrifuels, not the Joint Venture.

Because negotiations continued right up to closing and because of the large number of separate documents, each having to be signed by various combinations of parties, the closing took place over a two day period, September 25 and 26, 1985, at the law firm of Donovan, Leisure, Newton & Irvine.[20] The documents were stacked along a large conference table for the parties to review and sign. As discussions progressed during the closing process, several of the documents were updated and amended. In addition, on several occasions the parties broke off into their own groups to discuss matters internally or to negotiate one on one with another party and so were not always in the conference room.

Both Hamilton and Wohadlo testified that in conversations during this two day period they specifically asked Michelson to change the language of the MDS to reflect

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[20] Donovan & Leisure represented Agrifuels.

the 18 month schedule.[21] According to Hamilton, Michelson stated that he would only amend the MDS after performance began under the MDS as drafted and then only if the contractor showed it was consistently ahead of the 21 month schedule. Wohadlo's recollection of that conversation was basically the same: if Harbert/Lummus could demonstrate it was on the 18 month schedule, then DOE would amend the schedule. In other words, Michelson would not amend the schedule prior to closing, but if the contractor consistently worked on an 18 month schedule, DOE would shorten the MDS to 18 months. It is this conversation that plaintiff alleges amounts to a promise to pay on an accelerated schedule if the contractor "consistently exceeded the schedule." Wohadlo testified that this statement was very important to the Joint Venture and that if it had not had DOE's assurances on this point it would not have signed the agreements. Michelson, however, testified that he never negotiated directly with anyone from the Joint Venture or the banks. All his negotiations were with Pat Hamilton from Agrifuels.

Michelson did state, however, that he remembers Hamilton's request to amend the schedule but that it was agreed that a decision could not be made on the amendment prior to the actual closing. According to Michelson, DOE did not have the resources on site to fully evaluate

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[21] Wohadlo and Hamilton both recalled having a breakout session with Michelson during the pre-closing period. It was during this breakout session that according to plaintiff, Michelson agreed to amend the MDS if the contractor consistently exceeded the schedule.

the change. Michelson recalled that either he or Doug Mitchell from DOE's General Counsel's office told Hamilton that Agrifuels should write up the proposal so DOE could evaluate the request when they had the resources available. He testified he never told Hamilton or Wohadlo that DOE would definitely approve the change.

James Brown, an attorney at the law firm of Schiff, Harden & Waite, was present during the closing process. He testified that he never heard Michelson or Wohadlo mention an agreement to amend the schedule prior to the actual closing.[22] Beckman concurred in Brown's recollection and stated that Michelson never told him that he had reached an oral agreement with Harbert/Lummus or Agrifuels to amend the schedule and that no such agreement was presented to the approving official.[23]

Brown further testified that such an agreement would be highly significant to all parties. Croyle voiced similar concerns. He heard no such agreement and explained that if he had it would have been significant because he would want to ensure that the changed payments were guaranteed as well. Such an agreement, according to Brown, would have required a revision of

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[22] Schiff, Harden & Waite represented the Department of Energy during the negotiations and closing of the Agrifuels deal.

[23] The terms of the Agrifuels deal, as it was memorialized in writing, were presented to and approved by the Acting Director of the Office of Alcohol Fuels, Donna Fitzpatrick. As the approving official, Ms. Fitzpatrick's consent was necessary for the project to go forward.

numerous documents and perhaps additional negotiations,[24] especially in light of the integration clauses in the contracts. Therefore, Brown testified, if he had heard about such a side-bar agreement he would have counseled Michelson to put the agreement in writing. In addition, Brown stated that in this case any matters that arose just prior to closing were dealt with in writing, never through oral agreements.

The court finds that Michelson's version of these events – that he told Wohadlo and Hamilton that no decision could be made at that time on the request to amend the MDS – while not dramatically different than that of Wohadlo or Hamilton, is most reliable. The court finds that whatever conversations he had with Hamilton or Wohadlo during this pre-signing period, they did not include a specific commitment that DOE would amend the schedule automatically upon proof of acceleration by the Joint Venture. No declaration was made that irrevocably committed DOE to approving an altered schedule. It is simply too unlikely, given the concern at the closing for written expressions of commitment, that such a statement would have gone unremarked by Brown and Croyle or would not have been the subject of notes. The court is persuaded that Wohadlo and Hamilton simply read too much into Michelson's suggestion that Agrifuels should write up the proposal so DOE could evaluate it after closing.

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[24] Specifically, Brown testified that it would have raised questions as to the application of the bonus provisions already incorporated into the agreement.

In the event, as finally drafted, the MDS only authorized payment on a twenty-one month schedule, even if the project were to be completed in eighteen months. The draft Servicing Agreement was changed, however, to permit an amendment to the MDS to be made, but only with the consent of the Secretary of Energy or his designee. This was consistent with the overall role of DOE in approving all payments before the banks would disburse funds.[25] Croyle iterated this fact when he stated during the negotiation process that the banks would pay on the accelerated schedule, but only if DOE approved and guaranteed the payments.[26]

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[25] Amending the MDS would not have required the Government to guarantee any additional monies, it would simply have reallocated the guarantees from months 19, 20 and 21 to earlier months. According to Hamilton, prior to his pre-closing discussions with Michelson about changing the schedule from 21 to 18 months there was no provision in the contract documents to allow such a change. In response to Hamilton's query, section 4.07 of the Servicing Agreement was added which allowed the MDS to be amended with the consent of the Secretary of Energy.

[26] Since the EPC called for payment in arrears, at the end of the month Harbert/Lummus would determine how much work had been completed and the value of that work. It would then submit a payment request to Agrifuels who would incorporate these figures into its borrowing request. The borrowing request was then submitted to the construction monitor. The construction monitor verified that the indicated amount of work had been done and reviewed the request to make sure no work that was not authorized in that month was not paid for until authorized. The construction monitor then passed the borrowing request on to DOE for its approval. Once DOE approved the request, it would fax its authorization to BNE which had also received a copy of the request. Based on DOE's

Also part of the closing documents were copies of all the relevant corporate authorizations for the project as well as copies of the government representatives' delegations of authority. Specifically, the documents included a delegation from David Newman, the Director of Procurement Operations at DOE,[27] to Michelson, authorizing him to sign the documents on behalf of DOE. One of the lending banks was still concerned, however, with Michelson's authority to bind the Government and asked for an independent opinion of counsel to be signed by someone at the DOE stating that Michelson did have the authority to bind the Government to guarantee the loans. An independent opinion was signed by the appropriate official at DOE and was made part of the closing documents.

During trial, there was extensive evidence as to this chain of authority within DOE. It began with a delegation of authority from then Secretary of Energy James B.

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approval, BNE would tell Hibernia to disburse the money directly to the Joint Venture. It was not until disbursement that DOE was called upon to guarantee funds. The net effect of this procedure was that Harbert/Lummus would not be paid for its work for two months.

[27] Newman was part of the Headquarters Procurement Division, which had procurement responsibility over the Alcohol Fuels Guarantee Program. Steve Michelson's contracting authority flowed through the Procurement Division. Nevertheless, the Procurement Division had to get approval from the Program Office before entering into loan guarantee agreements. The Program Office, however, was dependent on the Procurement Division to actually enter into the agreements. The Program Office had no independent contracting authority.

Edwards to the Assistant Secretary of Management and Administration, Bill Heffelfinger. This delegation included the authority to:

> Enter into, approve, administer, modify, close-out, terminate, and take such other action as may be necessary and appropriate with respect to any procurement contract, sales contract, interagency agreement, financial assistance agreement, financial incentive agreement or other similar action binding the Department of Energy to the obligation and expenditure of public funds or to the sale of products and services. Such action shall include the rendering of approvals, determinations and decisions, except those required by law or regulation to be made by other authority.

The authority to enter into and modify agreements involving the Alcohol Fuel Programs was covered by this delegation. This authority was then re-delegated by Assistant Secretary Heffelfinger to Hillary Rauch, the Director of Procurement and Assistance Management.

On December 8, 1982, Rauch and Joseph J. Tribble, the Acting Director of Alcohol Fuels issued a delegation of authority to David Newman, the Director of Procurement Operations. The delegation, titled "Delegation of Authority with Respect To Loan Guarantee Agreement – Alcohol Fuels Energy Projects," gave Newman authority over awarded loan guarantee agreements.[28]

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[28] Specifically, paragraph A of the delegation authorized Newman to:

> 1. Perform post closing activities in accordance with Agreements, including the approval of disbursements. . . .

This document was followed up the next day by another document titled "Delegation of

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> 2. Negotiate the terms and conditions of modifications to Agreements. Modifications involving "extraordinary actions", shall require the approval of the Director [of the Office of Alcohol Fuels] and the concurrence of other appropriate Headquarters Elements, prior to any final action. For the purposes of this delegation, extraordinary actions are:
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> (a) those required in the event of termination of the Project, including those terminations pursuant to Agreements based on cost growth, schedule slippage, abandonment of the Project, or determination that the Project is not economically feasible;
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> (b) any waiver respecting an Event of Default;
>
> (c) changes to the Agreements affecting the Government's first lien position, and having the potential of exposing the Government to liability or loss in excess of $1,000,000;
>
> (d) reduction or withdrawal of the Guarantee;
>
> (e) any other actions materially affecting the Government's rights.

The delegation also stated in paragraph B:

> With respect to the Director, Office of Procurement Operations, the signatory authority and any of the other authorities described more fully in DOE 5700.5, Chapter I, 1.j., necessary to process all transactions implementing Agreements, except for extraordinary actions, referred to in Section A.2 above, resulting in a modification to the Agreement. With respect to such extraordinary actions, the approval of the Director, Procurement and Assistance Management shall be obtained prior to executing any formal modifications of the Agreement.

Authority."[29] This had the effect of superseding and invalidating a portion of the prior delegation. Newman was unclear as to why Ms. Rauch granted and then immediately revoked the authority in paragraph B. Newman was, however, certain that his authority under paragraph A remained.

This new delegation gave Newman the authority to:

> enter into, approve, and take such other action as may be necessary and appropriate with respect to any contractual arrangement, interagency agreement, grant, loan guarantee, or other similar instrument committing the Department of Energy to (1) the expenditure of public funds or (2) the sale of products and services, pursuant to applicable laws, Executive orders, regulations, directives, policies, and procedures. . . .
>
> The approval of the Director, Procurement and Assistance Management Directorate (or designee), is required prior to entering into or modifying such instruments as set forth below:
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> . . . .
>
> 3. With regard to loans, loan guarantees, price supports, guaranteed . . . agreements, and all other such financial incentive instruments,

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[29] The document began by stating:

> This memorandum is effective immediately and supersedes the delegations to you of Contracting Officer authority dated June 17, 1982, and paragraph B of the Delegation of Authority with Respect to Loan Guarantee Agreements – Alcohol Fuels Energy Projects, executed contemporaneously with this delegation of authority.

> actions with potential liabilities valued in excess of $50 million and, without regard to dollar value, actions that are defined as "extraordinary actions" in paragraph A of the above referenced contemporaneously executed Delegation of Authority on the condition that no award within your award authority is made without your prior approval or the prior approval of one acting for you in your absence. This authority may not be redelegated.

Thus, Newman's authority with respect to awarding Alcohol Fuel deals was limited to those actions that would cost the Government $50 million or less and those that were not "extraordinary actions." Newman, therefore, did not have the authority to enter into the original Agrifuels deal since it was worth over $50 million. He had to get transactional authority to enter into the Agrifuels contract.

On May 21, 1985, Newman sent a letter to his current boss, Bert Roth, the Director of Procurement and Assistance Management, requesting a one-time transactional delegation of authority to enter into the Agrifuels deal. In response, on May 23, 1985, Roth delegated to Newman the authority to "enter into, approve, and take such action(s) as may be necessary and appropriate to fully execute and close, . . . , the Agrifuels Refining Corporation Loan Guarantee Agreement and related documents." The document went on to state, however, "The authority to enter into and take related actions may be redelegated, however, the transaction approval authority may not be redelegated." In other words, Newman could re-delegate the signing authority to Michelson but could not delegate the approval authority to Michelson or anyone else.

On September 25, 1985, prior to the closing of the Agrifuels deal, Newman sent Michelson his delegation of authority.[30] The memo outlining Michelson's new authority specifically referenced the delegation of authority Newman received on May 23, 1985. The redelegation was subject to certain expressed limitations:

> (1) This delegation of authority does not extend to those actions defined as "extraordinary actions"
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> . . . .

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[30] The delegation stated: I hereby provide the following transaction approval and delegation of authority:

(1) Based upon review of the draft Closing Report dated May 10, 1985, draft Loan Guarantee Agreement, related documents, and briefings received on the Alcohol Fuels Loan Guarantee Program – Agrifuels Refining Corporation Loan Guarantee Agreement is hereby approved for execution and closure on behalf of the U.S. Department of Energy.

(2) The following authority is delegated to Mr. Stephen J. Michelson, being a duly appointed Contracting Officer.

Mr. Michelson is hereby delegated authority to enter into, and take such other action(s) as may be necessary and appropriate to fully execute and close the Agrifuels Refining Corporation Loan Guarantee Agreement, and related documents on behalf of the U.S. Department of Energy. . . .

. . . .

On that same date, Donna Fitzpatrick, the Acting Director of the Office of Alcohol Fuels, gave the Director of Procurement and Assistance Management, Newman's boss, the authority "to execute all necessary transaction documents and to subsequently execute the Guarantee in the form specified by such documents." This delegation was a necessary pre-requisite to Newman's receipt of authority and his subsequent delegation of authority to Michelson.

> (2) This delegation of authority, in addition, for purposes of agreement administration, covers only those actions with potential liabilities valued up to and including but not exceeding $25 million.

(emphasis in original). This delegation gave Michelson the transactional authority to enter into the Agrifuels agreement as well as administration authority up to $25 million.[31]

All the documents were signed and the contract went into effect on September 27, 1985.[32] Work commenced immediately. Wohadlo and Brabham both stated that from the outset, the Joint Venture planned to perform on an 18-month schedule.

Construction progress was monitored on behalf of DOE by the construction firm of Heyward-Robinson, International. Heyward-Robinson's on-site representative was Tom Nikolich. Each month Harbert/Lummus would submit an invoice to Agrifuels indicating the amount of completion on the project. Agrifuels would then forward the invoice, along with its borrowing request to DOE. Concurrently, Heyward-Robinson would submit its own estimate of work completion to DOE. As long as the

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[31] Defendant argues that Michelson did not have the authority to modify the MDS. The court notes that on at least one occasion a change order was later approved by Michelson reallocating funds from one month to an earlier month, thus changing the schedule. Pl.Ex. 65.

[32] Approximately $102 million was available for the project. Of that amount, $88 million was to be lent by the banks and guaranteed by DOE. The remaining amount was to be provided by Agrifuels and its parent companies.

estimates coincided, DOE would authorize the servicing bank to disburse funds based on the level of completion.[33] If the level of completion exceeded that called for in the 21 month schedule, however, DOE would only guarantee payment on the amount authorized for the given month. The remaining amounts would have to be recouped in a later month. As things stood, Harbert/Lummus might complete a given percentage of the project earlier than scheduled but would not be paid for the work until the schedule so allowed.

Construction went relatively smoothly during the beginning of the project with few change orders required. Those that were required were approved by the contracting officer, Michelson. In accordance with the contract documents, all the participants attended quarterly meetings to discuss progress and any problems encountered.

Beginning in July of 1986, construction began exceeding the 21 month schedule.[34] This prompted Agrifuels and Harbert/Lummus once again to raise the issue of amending the MDS. Hamilton testified that during July 1986 he had discussions with Wohadlo and Michelson about the amendment.[35] In response to Hamilton's

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[33] DOE's actual guarantee obligation did not come into effect until the servicing bank disbursed funds. If there was no disbursement there was no need for a guarantee.

[34] Wohadlo testified that, from the outset, Harbert/Lummus intended to build the plant on an 18 month schedule so it could earn the early completion bonus.

[35] Hamilton testified that he, Wohadlo, and Hamilton had informal face-to-face discussions in Louisiana to discuss the 18 month schedule.

statement that Agrifuels was going to submit the request to amend the MDS, Hamilton testified that Michelson responded, "[G]et all the documents together and get the construction monitor to approve it and we will look at it." A similar discussion took place between Hamilton and Michelson in August of 1986.[36] Again, Michelson stated that Harbert/Lummus should "get all the documents together[37], have the monitor sign off on it and then DOE would consider it." Wohadlo, however, also testified that he recalled Michelson responding that, "if Harbert/Lummus submitted all the required documents and the construction monitor agreed, DOE would approve the change." Michelson testified that he agreed to consider such a proposal, but denies having committed DOE to approving it. The court notes, in resolving this dispute, that Hamilton recalled at another point in his testimony that Michelson said, "Get the documents together, be sure the monitor signs off on it, and we'll process it." He did not recall Michelson specifically stating that DOE would approve it. Michelson's recollection coincided with Hamilton's testimony.[38] In addition, Ed Alper, the project manager at Harbert/Lummus, recalled Michelson stating

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[36] There was conflicting testimony as to whether the July or August discussions were telephonic or held face to face. There is no dispute, however, that they actually took place.

[37] It is unclear from the exhibits or the testimony presented what the required documents to approve the change order were.

[38] While Michelson could not recall the specifics of the conversations, he did testify that his response was "write it up, submit, and we'll evaluate it."

that if a change order was submitted, DOE would "process it." The court finds that Hamilton's statement is likely the most accurate rendition of what occurred.

On August 25, 1986, the Joint Venture submitted to Agrifuels a written request to modify the CPPS from a 21 month schedule to an 18 month one. Hamilton, however, was not entirely clear on what documentation was needed to support the requested amendment. Before he submitted the change order request to DOE he had numerous conversations with Michelson to discuss DOE's requirements for approval of the change.

A quarterly meeting was scheduled for September, 1986. Hamilton proposed that the MDS be considered along with construction progress. Alper recalled that when the topic of the 18 month schedule came up during the meeting, Michelson "urged the submission [of the change order request] and stated that the DOE was prepared to act positively to this request."

On September 30, after the quarterly meeting, Hamilton submitted a formal request on behalf of the Joint Venture to modify the CPPS.[39] The request contained the

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[39] Hamilton stated that he never heard anyone voice any opposition to acceleration and that in fact Michelson encouraged him to accelerate and told Hamilton that if he got the construction monitor to sign off on it, DOE would process Agrifuels' request for acceleration. He did not, however, explain his September 30 letter to Alper in which he states that Michelson had told him that DOE was not inclined to approve the change order.

Michelson does not dispute the fact that he did not oppose acceleration. He agreed that the contractor could accelerate

statement that, "Tom Nikolich [the construction monitor] agreed that the JV Contractor could possibly achieve Mechanical Completion by February 1, 1987." (Emphasis in original). Along with the formal request, Agrifuels submitted a revised MDS that showed the allocation of the monies in months 1 through 18, rather than 1 through 21. Hamilton sent a letter to Alper on the same date, however, which stated that "Steve Michelsen [sic] advised me on September 26, 1986 that DOE has not approved nor are they inclined to approve any request for extra payment by the JV Contractor in connection with acceleration of the 21-month completion schedule."

Nikolich sent a letter to Michelson on October 1, 1986, stating: "It appears the Contractor has the capability of completing his work three (3) months earlier than originally scheduled, which would result in their exceeding the cumulative percent of work to be completed for each of the remaining payments." Hamilton, as well as Ed Alper from the Joint Venture, also received a copy of this letter. At this point, the contract was at month 12 of the 21 month schedule. The Joint Venture's work was already 10 to 12 percent ahead of payments. Also, during this time Michelson was replaced as Contracting Officer by Thomas Keefe.

The documentation supplied by Agrifuels in its September 30 letter was inadequate according to DOE, however, and on October 10, Agrifuels requested that the

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performance but that Harbert/Lummus would do so at his own risk if the MDS was not modified. Without the modification, the contractor would still be paid on the 21 month schedule, regardless of its actual progress.

Joint Venture submit an updated 18 month schedule. This letter, signed by Hamilton, stated that "DOE is also considering amending the 21-month schedule to an 18-month schedule in the near future." When asked at trial why he used the phrase "is considering amending" rather than will amend, Hamilton replied that it was "just [his] style." The court notes, however, that it is consistent with the tone of his September 30 letter to Alper.

Despite the need for additional documentation to support the September 30 request, DOE began evaluating the Agrifuels proposal. On October 10, 1986, Edward Rizkalla, the Senior Projects Engineer in the Financial Incentives Operations Division, sent an engineering assessment of the proposal to Keefe, the new contracting officer.[40] Rizkalla stated that accelerated completion was possible but that he had several concerns, including impact of the acceleration on quality and safety, as well as the possible reduction in time for training and finding potential faults. Nevertheless, Rizkalla concluded, "Engineering approval for the acceleration of schedule is given with the reservations mentioned above."

On the same date, Rizkalla sent a letter to David Lindahl, the Director of the Program Office, in which he recommended that DOE approve Agrifuels' request for schedule acceleration. On October 14, 1986, Beckman concurred in the letter and on the same day Lindahl approved it.

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[40] The DOE Engineering Assessment, undertaken after receipt of change orders, was a pre-requisite to the granting of a change order to modify the construction schedule.

Several meetings took place following the concurrences in Rizkalla's assessment of acceleration. According to Beckman, during these meetings information from other, unspecified, sources persuaded him to disagree with Rizkalla's earlier assessment. The only written record of this disagreement was in Keefe's October 21 letter to Hamilton stating that Agrifuels' September 30 request to amend the CPPS was under study and that the Department's response would be made after submission and review of an amended disbursement schedule. The letter also expressed the Department's concerns regarding the accelerated schedule.[41]

On October 22, 1986, Harbert/Lummus resubmitted a revised 18 month schedule to Agrifuels. This revised schedule included additional information to support its change order request.

Despite the fact that Keefe never signed the requested scheduling change order, beginning in November, 1986, references to an 18 month schedule began appearing in government documents. The November monthly status report on the project, prepared by Steve Grossman from the Program Office,[42] states, "The Department recently approved [Agrifuels'] proposed reduction in the construction schedule from 21 to 18 months." In a

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[41] The official DOE file copy of this letter has concurrences signed by Rizkalla, the author, Keefe, Jim Renjilian, of the General Counsel's office, Dan Beckman, and Steve Grossman.

[42] Steve Grossman was a financial analyst who worked for the contracting officer. Part of his responsibilities were to prepare the status reports on the project.

monthly status report prepared by Rizkalla, an attachment showing the total progress of the project states that it went "to an 18 month schedule in Sep[tember]." Similarly, in a memo to file from the Hibernia National Bank, Howard Blank refers to the project as on an 18 month schedule. There is no other indication that the CO had authorized the acceleration and DOE had yet to notify Agrifuels of its decision to approve or deny its modification request.

Throughout this time, Wohadlo became increasingly nervous that the Government was not going to process the change request. Moreover, Harbert/Lummus was even having difficulty getting paid under the 21-month schedule. The January progress payment, for work completed in November was not paid on time.[43] As of that time the construction monitor had certified that the project was 92.748 percent complete. When Wohadlo called Keefe to find out why the payment was delayed, Keefe responded that DOE was having problems with the banks but that there was no reason to worry about payment. Wohadlo also asked about the 18-month schedule change. According to Wohadlo, Keefe responded, "we're still working [on] it, but early completion will take care of everything." This comment caused Wohadlo greater concern. For the first time, he began to believe that the change would not be made, and that DOE was going to ride out the process until completion.

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[43] There was conflicting testimony as to when this payment was actually made. It is uncontroverted that the payment was eventually made, but was made late.

On January 7, 1987, Agrifuels once again submitted a formal request to change the MDS. The letter went on to state that this request superseded Agrifuels' earlier request for modification.

The next quarterly meeting was scheduled for February 5, 1987, in Washington, D.C. Agrifuels sent all the parties an agenda that called for a discussion of the 18 month revision. The meeting, however, was not held until the following week and took place in Louisiana rather than in Washington. By this time however, other problems had arisen. Triad America Corp., and Newedge, two of the parent companies of Edgington Oil, which was, in turn, the parent of Agrifuels, declared Chapter 11 bankruptcy on January 27, 1987. This caused a great deal of concern at the meeting. Nevertheless, according to Hamilton, the 18 month revision was discussed. Hamilton testified that at the meeting, Tom Keefe assured him that DOE was working on Agrifuels' revision request and that it would be approved and the schedule modified to 18 months. There is no confirming or contrary testimony from Keefe because he is now deceased and he was not deposed prior to his death. The court finds, however, that it is unlikely that Keefe's earlier approach that "early completion will take care of everything" would have been abandoned so casually. It is more likely that Keefe, like Michelson before him, was trying to solve the issue of whether to accelerate payments by having it overtaken by events and that his statements, even if subject to misconstruction, were not intended, and should not have been received as contractual in nature.

When Triad and Newedge filed petitions for bankruptcy on January 26, 1987, an event of default under

section 12.1(g) of the Guarantee agreement occurred. A formal declaration of default was not issued by DOE in January, however. Instead, on January 30, 1987, Agrifuels notified Keefe of a potential for default based on Triad's and Newedge's bankruptcy. Keefe contacted the bank group and DOE, and the banks and Agrifuels agreed that a waiver of the potential default would be issued. The default was waived for borrowing requests 17 in January and 18 in February. The default, however, was of a continuing nature and so had to be waived for each subsequent borrowing request.

Despite the waivers, there was still concern for the financial viability of the plant in the coming months. Triad had issued a corporate guarantee for the cost of the ongoing materials and there was concern that the new plant would not be able to generate money quickly enough to overcome the deficit left by Triad's bankruptcy. Neither Triad or Edgington could put up additional funds.

On February 24, 1987, at the urging of Edgington, another meeting was held among representatives of DOE, the banks, Harbert/Lummus, and Agrifuels. Edgington sought the meeting to present a plan to restructure Agrifuels so that the project could continue despite Triad's bankruptcy. In addition, Agrifuels put additional pressure on DOE at the meeting to approve the schedule modification so that the plant could be completed before the money ran out.[44] At the February meeting, the lawyer

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[44] Agrifuels was worried that with bankruptcies of Triad and Newedge and the restructuring of Edgington it would be

for DOE, Michael Cohen, stated that DOE and Harbert/Lummus had a deal about changing the MDS and he was unsure why the schedule had not yet been changed.[45] According to Powers – the Joint Venture attorney – and Wohadlo, no one at the meeting, or at any time subsequent, disputed Cohen's statement regarding the "deal" between Agrifuels and DOE.

Wohadlo testified that he stated that before any restructuring of the obligations under the guarantee agreement, the change authorizing payment on the 18-month schedule had to be issued. The Joint Venture was concerned that without the change, the gap between the work it had done and the amount it had been paid would continue to grow. In response, according to Wohadlo, Beckman stated that "DOE was committed to funding the project to completion, and if the contractor completes the project, all the payments would work out in the end."

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difficult to meet its capital obligations under the guarantee agreement. Agrifuels wanted to transfer some of the money it saved from cost underruns on certain line items to help fund cost overruns in other line items. The Government, however, took the position that even if Agrifuels was able to lower costs in one line item, it could not transfer the money saved to other line items. This disagreement was one of the major foci of the February 24 meeting.

[45] The notes of Bill Powers, the Joint Venture's attorney, from the February 24 meeting show that Cohen stated that the "payment schedule was not [set] in concrete" and that DOE and the banks "assured that if construction was speeded up, milestone payment schedule would be changed." Furthermore, Cohen indicated that there was "no indication that DOE/Bank[s] would delay for months." Cohen did not testify.

Beckman could not recall, but did not deny making such a statement. Croyle could not recall such a statement by Beckman, or anyone else, although he also could not recall if Beckman was actually at the meeting. Alper recalled the statement but thought it came from Keefe. Wohadlo testified that, on other occasions, Keefe had made the same offer that, if the Joint Venture stayed on the job, DOE would fund the project to completion, although he could not recall any specific times.

The court believes Wohadlo's testimony that Beckman made the statement. The court attaches no significance to Beckman's failure to recollect it. Moreover, the court finds that Keefe was present when the statement was made, and did not question it.

Harbert/Lummus takes the position that this assurance of continued DOE involvement constitutes a contractually enforceable promise breached by the Government. Wohadlo testified that, but for Beckman's and Keefe's assurances that DOE would continue to issue guarantees through project completion, Harbert/Lummus would have stopped work immediately for failure to receive payment.

It was also during the February 24 meeting that BNE stated to Agrifuels that the banks would not disburse the February payment or any subsequent payments unless a guarantee was provided or payment made by Agrifuels on a $639,000 outstanding note. The banks went on to state that any additional disbursements would have to be guaranteed as well. Because of the bankruptcy of Triad, Agrifuels did not have the equity to guarantee the note. Instead, Hamilton asked Wohadlo if the Joint Venture

could guarantee the note. BNE also said that they wanted Edgington to put up funding for all ineligible costs. Edgington did not have the equity to do this so Agrifuels asked the Joint Venture if they would fund this as well. There is no indication in the record as to what the Joint Venture's immediate response was to these requests.

Following the February 24 meeting, Wohadlo put his concerns in a letter, dated March 3, 1987, addressed to all the participants.[46] As of that date, Agrifuels owed the Joint Venture $4.2 million. The letter stated:

> We have been building this plant on an 18-month construction schedule since work began. We have repeatedly requested in writing a change order to modify the 21-month payment schedule to the actual 18-month construction schedule. We understood at [the February 24] meeting that the DOE has reviewed and approved this change order, and it is on the Secretary's desk for signature.
>
> Neither the DOE nor the Servicer will commit as to when this change order would be signed by the Secretary. We have never been told that the change order would not be signed and that the Owner, Servicer, or Secretary was not interested in the early completion of this project. We agreed to a 21-month payment schedule only

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[46] The letter was addressed to Pat Hamilton with copies to Edgington Oil, Donovan & Leisure, Lummus Crest, the construction monitor Tom Nikolich, the Secretary of Energy, Ralph Benko, and Thomas Keefe at DOE, James Croyle at BNE, and the Hibernia National Bank.

> after the assurances of Agrifuels and the Servicer that there would be no problems modifying this to an 18-month pay schedule if such progress was actually obtained. In reliance upon that assurance, we accelerated construction on an 18-month basis. The Construction Monitor has certified that this accelerated construction has been accomplished! However, for some reason, the Owner,[47] Servicer, and Secretary have not agreed to a change order as promised, in spite of the fact that the DOE and Servicer at Tuesday's meeting authorized early disbursement of start-up funds in recognition of the early completion. This approaches bad faith on the part of the Banks and DOE to the Contractor. We expect the DOE to approve the revised schedule and to pay the difference between the actual completion versus the 21-month schedule by an interim disbursement no later than March 15, 1987.

The letter went on to state that the Joint Venture was aware that Agrifuels was in default of the loan agreement and that Agrifuels might not be able to further fund the project. The Joint Venture, therefore, notified the parties of its intent to stop work if it was not paid what it was then owed.

Harbert/Lummus did not receive the February progress payment on time. Brabham testified that by this time the Joint Venture was considering stopping work

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[47] Wohadlo stated that he included the owner here because he could not negotiate directly with DOE because his contract was with Agrifuels, not DOE. He was aware that Agrifuels agreed with the Joint Venture's change order request.

immediately. Wohadlo called either Keefe or Dave Erdman[48] at DOE to find out why payment had not been sent. He was informed that DOE was still having "trouble" with the banks, but that the payment should be coming soon.[49] Wohadlo asked about the 18-month schedule. The DOE representative responded, "you're almost complete, when you finish, everything will be caught up."

On March 4, Wohadlo spoke with someone at DOE and was told that DOE's "upper management" had decided not to amend the MDS. On March 9, Wohadlo sent a letter to Agrifuels, DOE, and BNE stating that the January progress payment was overdue and threatening to stop work within five days. Harbert/Lummus received

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[48] Erdman was a contract specialist in the Financial Incentives Operations Division. He reported directly to Tom Keefe. Erdman replaced Steve Grossman on the Agrifuels project in January 1987.

[49] The banks stated in early March that they would not disburse any additional funds unless the entire amount of Note C was guaranteed by Agrifuels or another party. There were three notes involved in the project. Note A involved the 90 percent share of disbursements guaranteed by DOE. Note B amounted to 5 percent of the disbursement and was guaranteed by letters of credit put up by Agrifuels and its parent companies. Note C was the remaining 5 percent of the disbursement. Under the guarantee and credit agreements, this note was not supposed to be guaranteed. DOE wanted this provision so Agrifuels would have some financial exposure if the project failed. After the banks said they would no longer disburse funds without a guarantee on Note C DOE acquiesced on this requirement. The entire amount of Note C comprised several million dollars.

no direct response to this letter, although Wohadlo testified that the January progress payment was released shortly thereafter.[50]

The Government did, however, authorize $1.8 million to be moved from months 20 and 21 to month 17 to pay for start-up costs. This was necessary because by month 17 the plant was near completion and the Joint Venture was preparing for start-up. This amount was put into an escrow account at Hibernia and was used to pay the suppliers of the start-up material directly. The money did not go through Agrifuels. Instead Agrifuels was to purchase the material from suppliers and at the end of the month the suppliers would be paid out of the escrow account.

On March 13, 1987, Keefe notified Agrifuels in writing that DOE would not approve an amendment to the MDS. Keefe wrote that the Joint Venture had undertaken the decision to accelerate unilaterally out of a desire to receive the bonus payments, not because of a promise to accelerate. According to Keefe, "there [was] neither [a] legal nor equitable obligation on the part of the Department to grant th[e] [change order]." The letter also iterated the Department's position that cost underruns on one line item could not be transferred to another line item to counter cost overruns.

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[50] Croyle stated that the reason for the delays in payments was that, because Agrifuels was in default of the agreement, waivers had to be obtained from all the lending banks. These waivers, according to Croyle, often took time to process.

At some point, Harbert/Lummus had responded affirmatively to Agrifuels' earlier inquiry concerning whether the Joint Venture would partially assume Agrifuels' outstanding obligations to the banks. It would only do this, however, if Agrifuels and DOE met certain conditions. The proposal was discussed in a March 24, 1987 telephone conference between Powers and Croyle of BNE. Croyle stated that the Joint Venture's proposals had "piqued" DOE's interests and that DOE might informally be willing to guarantee more funding in return for Harbert/Lummus performing the additional obligations discussed below.[51]

On the same date, Agrifuels submitted borrowing request 19. Agrifuels was still in technical default of the guarantee agreement. A waiver was requested but never issued by DOE or BNE for this borrowing request and the request was not honored by Hibernia. Harbert/Lummus has never been paid for the work authorized and completed under this request.[52]

Despite the fact that DOE had formally denied the acceleration request, a meeting was held in New Orleans

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[51] This statement came from Croyle, however, not DOE and so cannot be attributed to DOE.

[52] The total request was for $15,039,583.59, of which $2,248,038.08 would be met by Agrifuels' equity contribution. The remaining amount was to be paid by the banks and guaranteed by DOE. The borrowing request also contained Harbert/Lummus' request for payment of $7,000,035.00, however, only $2,466,295.00 of that amount was authorized by the construction monitor as payable. The remaining amount was for work that was completed, but was not recoverable until later months.

on March 26, to discuss once again the 18 month proposal. Representatives of Harbert/Lummus, Agrifuels, DOE, BNE, and Hibernia attended. Agrifuels and the banks agreed that the schedule should be changed to 18 months. Despite its earlier rejection, DOE announced that it could not take a position at that time and that further discussions were needed.

On April 7, 1987, the Joint Venture responded in writing to Agrifuels' request that Harbert/Lummus guarantee a portion of the outstanding obligation to the banks. The letter expressed a willingness to assume substantial responsibility for guaranteeing or funding the balance of the project, but would only do so if certain conditions were met. One of these conditions was payment in full for all work completed and a draw down of the remaining funds into an escrow account. The letter further stated that if the Joint Venture was not paid what it was owed by April 15, it would stop working.

Agrifuels responded to the Joint Venture's April 7 letter on April 8, with a counteroffer, agreeing to some of the Joint Venture's demands and rejecting others.[53] Agrifuels' counteroffer required the Joint Venture to accept

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[53] Agrifuels accepted Harbert/Lummus' proposals on the reimbursement of sales tax, the payment for syrup and molasses, approval and payment of change orders 11 and 13, the payment of interest on several late payments, the payment of several eligible and ineligible contract allowance items, an extension of the completion date for every day of delay in caused by Agrifuels, the terms of the repayment of Harbert/Lummus' letter of credit on Note "C" and the granting of a second mortgage to Harbert/Lummus for any monies loaned to Agrifuels. Agrifuels stated that it could not accept Harbert/Lummus' demand for payment for actual progress to date, an

the new terms by the close of business the following day. Agrifuels stated that it was very interested in completing the project but that if Harbert/Lummus did not accept Agrifuels' terms, the project would not receive any additional funds.[54]

Also on April 8, Croyle sent a letter to Hamilton in which he discussed a letter BNE had received from Edgington in which Edgington indicated that the project was no longer economically viable and that Agrifuels should abandon it.[55] In his letter, Croyle reminded Hamilton that Agrifuels was still contractually required to meet its obligations under the Guarantee Agreement and that if it failed to do so the banks would take legal action.

In the wake of the Agrifuels' response to his earlier letter, Wohadlo requested that the parties meet on April 9

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escrow of the remaining funds, the payment of change orders 8 and 10 which were rejected by DOE and the payment for waste water treatment plant seed and feed. Agrifuels also stated that it would not accept liability for Edgington Oil's obligation to repay Harbert/Lummus' loan or Harbert/Lummus' proposal to participate in any Agrifuels decision relative to Edgington Oil or the use of Agrifuels funds to repay the Joint Venture's loan to Edgington Oil.

[54] As stated above, the bank group had informed Agrifuels that it would loan no more money without additional obligations to cover the remaining ten percent. If Harbert/Lummus did not provide this guarantee, Agrifuels had no alternative to receive funding and the project would have to be halted.

[55] Edgington had earlier agreed to buy portions of the ethanol output of the completed plant. Edgington's letter of March 23, 1987, stated that it would no longer meet its obligations under this agreement.

to discuss the Joint Venture's proposal. Wohadlo testified that the meeting was intended to be a four-way negotiating session that would result in a restructuring of the obligations that Agrifuels' parent chain could not fulfill. Hamilton agreed and called a meeting of DOE, the banks, Agrifuels, and the Joint Venture.

In preparation for this meeting, Beckman, Keefe, Donna Fitzpatrick, and several other DOE staffers met with Under Secretary of Energy Joseph Salgado at DOE headquarters in Washington, D.C. to discuss the future viability of the Agrifuels project. During that meeting, Keefe stated that if the MDS became a sticking point in the negotiations, DOE should give on this point if it was a deal breaker.[56] His notes of the meeting state that DOE was proceeding on the understanding that the Secretary had decided to continue the project. At this point, the Office of Procurement had projected that the cost of shutting down the project would be more than the cost of completing the plant.

At the conclusion of the meeting Under Secretary Salgado stated that he would meet with Secretary of Energy John Herrington while Beckman and the others met with the project participants. Salgado would inform Beckman later of the Secretary's decision on whether or not to continue the project.

Later that morning, representatives from all the relevant parties met at DOE to discuss the progress and

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[56] This is reflected in Keefe's meeting notes.

future of the project.[57] There had been ongoing negotiations between the Joint Venture and Agrifuels about restructuring the obligations of Agrifuels' parent chain. At that point Harbert/Lummus still had not received its February Progress payment.[58] Despite this, Wohadlo testified that the meeting was going well, and was one of the better meetings the group had had for quite a long time. Beckman agreed with this assessment. At some point, however, Beckman was called away to meet with Salgado who informed him that the Secretary had decided that the project was no longer economically feasible and that the Department was no longer going to guarantee funds for the project.[59] Beckman returned to the Agrifuels meeting and spoke with representatives from each party individually. In these individual meetings he informed them of the Secretary's decision to discontinue the funding guarantee. When Wohadlo asked about payments the Joint Venture was owed, Beckman could not provide an answer.

In a later memo to the Agrifuels credit file, Howard Blank from the Hibernia National Bank wrote:

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[57] In attendance were Beckman, Keefe and one or two others for DOE, Wohadlo and Alper for the Joint Venture, Harbert's in-house counsel Bill Clower, Lummus' in-house counsel, Gerry Kaye, and a representative of the Bank of New England.

[58] There was also testimony that at this point the January progress payment had not yet been released. As stated above, the court makes no finding as to when the payment was released.

[59] Keefe had, however, authorized a change order the previous day for $69,160.00, bringing the contract price up to $80,385,460.00.

> The Department of Energy (DOE) halted construction funding at the close of business Thursday, April 9, 1987. . . .
>
> The Bank Group was willing to continue funding before the DOE announcement, provided all future fundings were guaranteed or cash collateralized. . . . The Bank Group's goal was to get the plant mechanically complete and past the performance/acceptance test in order to give it a chance to operate.
>
> The contractor was reportedly prepared to put up a letter of credit to secure the unsecured 5% going forward. However the DOE mysteriously stopped the project. They had always voiced their desire to build out the plant when the Bank Group previously visited the continuation of funding issue. This made sense because, as the potentially largest creditor, a complete and tested plant would be more valuable to them in a liquidation scenario.

During trial, Beckman agreed that DOE had in fact voiced its desire for the Joint Venture to build out the plant because it would be more valuable than an uncompleted plant. He denied, however, ever stating that DOE would continue its guarantees on the plant.

At the time the funding guarantee was terminated, much of the plant was already in the hands of the operational staff and ethanol was being produced. Only punchlist items remained. Ethanol production had begun in late March and continued until Hamilton finally shut the plant down on April 10. According to Hamilton, at the time of shut down, 20,000 gallons had been produced

and the plant was only days away from actual start up.[60] The plant was less than two weeks away from the performance test that presumably would have led to acceptance by the Government. The certificate of mechanical completion for the plant was issued on April 15, 1987. Brabham testified that the plant would have met the acceptance test requirements by April 30, 1987.

On June 9, Keefe sent a letter to BNE requesting that the banks not take action to demand immediate repayment of the guaranteed loans from Agrifuels. Keefe requested a deferral so that the parties would have time to come up with a viable way to complete the project. The banks agreed.

According to Beckman, the parties discussed several alternatives to keep the project alive. None of these options proved viable, however. DOE then contracted with Harbert/Lummus directly to shut down and maintain the plant.[61] On August 7, 1987, DOE sent Agrifuels a letter formally notifying it that it was in default of sections 12.1(a), 12.1(g) and 12.1(i) of the Guarantee Agreement. This notification stated that the Government would

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[60] The ethanol produced, however, was only a pre-seed mixture and was not the type of ethanol that would finally be produced at the plant and the type necessary to pass the performance test. According to Wohadlo, however, the pre-seed mixture was a necessary pre-cursor to making the required type of ethanol.

[61] This was a separate contract that lasted approximately 7 months. Harbert/Lummus was paid for its work in advance. DOE later contracted with H.R. International to be the long-term caretaker of the plant.

no longer guarantee any additional funds and its guarantee would be limited only to those funds already outstanding. The reason for the delay between the April announcement of termination of future guarantees and the formal August default was that in the interim there were ongoing discussions among Agrifuels, DOE, and the banks to try to work out ways to continue funding the plant.

On August 11, Agrifuels received another letter from DOE declaring that the principal amounts of all guaranteed notes, together with all accrued interest and all other amounts owed to the United States, were immediately due and payable. These monies were never repaid by Agrifuels.

The Government took over the plant a year after default. At some point, Agrifuels offered to buy the plant for $12 million in cash and a first mortgage on the remaining amount but the Government refused. DOE was unable to sell the property as a working ethanol plant and eventually sold the plant for scrap for approximately $3 million. According to Erdman, DOE, under the terms of the guarantee agreement, paid the bank consortium "somewhere in the neighborhood of $70 million."

The Joint Venture had submitted payment requests 17, 18, 19, and 20, which were in turn included in Agrifuels borrowing requests 18, 19, 20, and 21 respectively. Of these, Harbert/Lummus was only paid for a portion of payment request 17.[62] Agrifuels never paid the Joint Venture for work done in February, March, or April 1987. As

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[62] Harbert/Lummus was paid the full authorized amount of payment requests 1 through 16. However, in some instances,

of payment request 20 in April 1987, the construction monitor certified that the plant was 99.039 percent complete.

DISCUSSION

Recognizing that there is no privity of contract established between DOE and itself in any of the written agreements, Harbert/Lummus alleges that DOE on either of two occasions orally obligated itself directly to the Joint Venture to approve the acceleration of the MDS if construction progressed on an 18-month schedule. If the payment schedule had been accelerated, then Harbert/Lummus would have been eligible for payment corresponding more closely to its actual work. It also contends that a separate contractual relationship was formed later between the two entities when Keefe and Beckman represented that DOE was committed to guaranteeing funds through the completion of the project. The Joint Venture contends that, but for this assurance, it would have ceased work.

The Government denies that any of these promises were made. Furthermore, it argues that even if they were made, under the regulatory scheme involved, an oral statement is not sufficient to bind the Government. Lastly, the Government argues that none of the individuals had the authority to bind the Government to such agreements. For the reasons set out below, the court concludes that DOE never obligated itself contractually to

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the Joint Venture may have performed work in one month that was not authorized until a later month.

amend the MDS. It does conclude, however, that DOE made a binding, unilateral[63] offer to Harbert/Lummus to continue guaranteeing loan installments in exchange for the Joint Venture's continuing to work on the project.

Amending the Milestone Disbursement Schedule.

A contract with the Government, whether express or implied-in-fact, is established by showing: (1) a mutual intent to enter into a contract; (2) a lack of ambiguity in the offer and acceptance; (3) the authority to contract on the part of the government agent whose conduct is relied upon; and (4) consideration. *OAO Corp. v. United States*, 17 Cl.Ct. 91, 98 (1989) (citing *Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed.Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985)); *Truckee-Carson Irrigation Dist. v. United States*, 14 Cl.Ct. 361, 370, *aff'd*, 864 F.2d 149 (Fed.Cir.1988) (table). The alleged agreements to alter the MDS are challenged by the Government on the first three of these elements. It is unnecessary to consider all of the asserted deficiencies, however, because the court is persuaded that the alleged contracts founder on the first two.

With respect to the pre-closing conversations, the court has previously found that Michelson did not specifically state to Hamilton or Wohadlo that DOE would approve the change request. The court finds it most likely that Michelson only committed to considering the

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[63] A unilateral contract can arise "where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance. . . . " *Lucas v. United States*, 25 Cl.Ct. 298, 304 (1992) (citing *Simmons v. United States*, 308 F.2d 160, 164 (4th Cir.1962)).

request, once made, after performance began. He told them that DOE did not have the resources on site to evaluate the proposal and that Agrifuels should submit a formal proposal after closing. These statements cannot be characterized as an unambiguous offer to amend the MDS; they do not express an intent to bind DOE to amend the schedule, even if the Joint Venture was certified to have accelerated.

Moreover, given the context of the closing, it is unlikely that there was a mutual intent to enter into an obligation separate from all the other documents. As the court in *OAO Corp.* wrote, "where the parties contemplate that their contractual relationship would arise by means of a written agreement, no contract can be implied. 17 Cl.Ct. at 99 (citing *Pacific Gas & Elec. Co. v. United States*, 3 Cl.Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed.Cir.1984) (table)). While in this case there was no writing executed as between DOE and Harbert/Lummus, the parties' rights and obligations were nevertheless captured in written agreements executed contemporaneously with these statements. Those other documents had been, and continued to be, the subject of negotiation involving both DOE and the Joint Venture. The logical place to have captured the substance of what Harbert/Lummus was seeking was either in the MDS itself or in a separate document executed contemporaneously. The obvious reason neither was done is that there was no agreement to accelerate automatically upon the monitor's certification. While Michelson may have unduly encouraged the Joint Venture, the court believes that he was content to postpone the problem with vague assurances of future consideration of altering the schedule. If the plaintiff needed

more assurance, it should have insisted on a written agreement as part of the closing.

Moreover, the fact that the Servicing Agreement was amended during closing to accommodate a future request for acceleration is significant. It suggests that the modification represented the substance of the parties' agreement with respect to acceleration.

The alleged promise made in late August 1986 to accelerate the guarantee and payment schedule suffers from a similar infirmity.[64] The statement that DOE would "process" the proposal to accelerate does not constitute an unambiguous expression of intent on the part of DOE to amend the MDS. The parties understood that, regardless of what Michelson may have said, acceleration required a signature by someone at the CO level or higher. Even Wohadlo recognized as late as March 3, 1987, that approvals by the requisite authorities within DOE were necessary and had not yet been given. Although the word "process," may, in the right context, include an implication of approval, it could not objectively have been construed that way under these circumstances. Michelson committed the agency to considering whatever the Joint Venture and Agrifuels proposed. While his comment was no doubt intended to encourage hope in the hearers, it simply did not carry the gravitas of a contractual representation. It may have been motivated

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[64] Wohadlo testified that the face to face meeting in Louisiana occurred in August, not July as Hamilton testified. Whether the statements were made in face to face meetings or telephonically is not relevant to the more general inquiry of what exactly was said.

by an intent to placate or postpone, but not by an intent to bind the Government.

The court notes finally that in his letter of March 3, 1987, Wohadlo summarized the earlier representations in the following telling way: that the Joint Venture only agreed to the 21-month payment schedule "after the assurances of Agrifuels and the Servicer" that there would be no problems changing to an 18-month pay schedule if such progress was actually obtained. (Emphasis added). Such assurances may have come from those sources, but they were not made by DOE.

The Joint Venture also contends that later, after Beckman and Lindahl concurred in Rizkalla's engineering recommendation to amend the MDS, Keefe's failure to sign off on the change was an abuse of discretion and violates Section 5700.5 of the agency's internal regulations. That section states, in part: "The contracting officer will take contractual steps consistent with the program office's decision and the contractual terms and conditions." Plaintiff contends that Lindahl and Beckman's concurrences constitute Program Office approval, and hence Keefe had no had no choice but to sign off on the change order.

The court disagrees with plaintiff's analysis. While the Program Office had authority to direct the CO to make contract changes, it is the CO who acts for the agency with respect to the outside world. The Program Office has no contracting authority. Accordingly, if the court assumes that the Program Office had officially instructed the CO to take some action, Keefe may have

run afoul of section 5700.5, but only as a matter of internal agency policy. Violation of that section would not amount to a breach of contract as against plaintiff. Moreover, there is no reason to think that the Program Office position had been formalized to the point that section 5700.5 was implicated. The plaintiff was never officially notified of a "Program Office" position. Beckman testified that, subsequent to seeing the engineering assessment, he attended a meeting in which additional information about the change order was presented and that this additional information caused him to change his mind and decide against approving the change. The court holds that Beckman's and Lindahl's concurrence in the engineering assessment did not constitute the agency's approval of the change or obligate the CO to approve the change order.[65]

Funding the project through completion.

The court has found that, during the February 24 meeting, Beckman stated that DOE was committed to "funding" the project through completion if the Joint Venture did not follow through on its threat to walk off the job. The court has also found that Keefe was present when that statement was made. It finds here that Keefe's silence amounted to an adoption of Beckman's statement. It is also clear that Beckman, and thus Keefe, intended Harbert/Lummus to act on the representation, and that Harbert/Lummus relied on it. The court believes Wohadlo's and Hamilton's testimony that, in the absence

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[65] Beckman also testified that it was common practice to hold meetings to discuss change orders after the engineering and other assessments had been received.

of Beckman's assurance, the Joint Venture would have quit work altogether. Harbert/Lummus thus accepted DOE's unilateral offer and simultaneously gave valuable consideration by staying on the job.

As this court has previously stated, "[t]here is ample case law holding that a contractual relationship arises between the government and a private party if promissory words of the former induce significant action by the latter in reliance thereon." *Wells Fargo Bank, N.A. v. United States*, 26 Cl.Ct. 805 (1992), *aff'd in relevant part*, 88 F.3d 1012 (Fed.Cir.1996). "Thus, where a unilateral contract is at issue, the fact that only one party has made a promise does not imply that a contract does not exist. A contract comes into existence as soon as the other party commences performance." *Id.* The Restatement (Second) of Contracts summarizes the relevant case law as follows: "Where an offer invites an offeree to accept by rendering performance . . . an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." *Id.* at § 45(1).

There is no question in the present circumstances that promissory words induced performance by Harbert/Lummus. There are, however, a number of factors that complicate resolution. The court notes initially that Beckman's statement cannot be construed literally as a commitment to fund the project. The plain import of the words is that DOE would live up to its contractual obligations, but those did not include funding. The Government had originally obligated itself to partially guarantee monies advanced by the banks, not to furnish construction funds itself. Beckman was, in effect, telling Harbert/Lummus that, if it continued to build the plant, DOE

would honor its commitments to the banks to guarantee 90 percent of the monies they advanced.

Unlike a typical guarantor, the Government was involved at two points, both before and after the advance of monies. After Agrifuels submitting a borrowing request, prompted by a payment request from the Joint Venture, the construction monitor was required to certify work according to the original schedule. Only after DOE approved the request would it go to the banks. DOE's duties with respect to guaranteeing a particular installment of loans would not arise until the disbursement had been made by the banks.

There is no basis for concluding that DOE defaulted in its obligations with respect to borrowing requests for February and March. Its approval of advances with respect to work due to be paid for according to the 21 month schedule was sent to the banks. Those loans were held up because BNE informed Agrifuels that the banks would not disburse any additional funding unless the unsecured and unguaranteed 10 percent was supported by additional guarantees or collateral. This was in response to a letter the banks received from Newedge, one of Agrifuels' corporate parents, which stated that Newedge would no longer live up to its obligation to guarantee 5 percent of the unsecured amount.

It is important to note also what Beckman and Keefe did not promise. They did not, as Harbert/Lummus suggests, agree on behalf of DOE to assume Agrifuels' direct obligation to the Joint Venture to pay for past or future work. They only obligated DOE to continue the Government's role as guarantor of future borrowing requests.

Secretary Herrington announced in April that no new funds would be guaranteed. On the face of it, this appears to be an anticipatory repudiation of DOE's commitment to Harbert/Lummus that it would not renege on it obligations as guarantor. Although no grounds were officially announced at the April meeting, the formal default of Agrifuels in August cited provisions of the guarantee agreement relating to the following default events: the bankruptcies of the parent corporations, a judgment against Agrifuels or one of its parent corporations, and failure of Agrifuels to pay some of its notes to the banks.

There can be no doubt that, as between Agrifuels and DOE, the agency was, for aught that appears, within its contractual rights in withdrawing from the guarantee commitment. The bankruptcies and judgment against Triad gave grounds for DOE to default the contractor. While those bases for default had been waived for January and February, those waivers would not preclude the agency from acting in April.[66]

Another fact has to be considered. With respect to the additional work Harbert/Lummus did after February 24, DOE was never put into the position of having to meet its obligations to Agrifuels under the guarantee contract. The work had not been reached on the MDS. As DOE was

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[66] A formal default was not declared until August. The court does not view that fact as determinative of DOE's obligations as against the Joint Venture. If announcing a cessation of guarantees was a breach of a separate obligation to Harbert/Lummus, the latter was nevertheless on notice at that point that further effort would be at its own risk.

well aware, the Joint Venture was substantially ahead of schedule with respect to completing the work. Barring a change to the MDS, that work could not yet support a payment or loan request. Although the point is not argued by the Government, the court has to consider the fact that Agrifuel's threats in early April to abandon the project, as well as the banks' related threats not to advance any additional monies, may have meant, even absent the DOE's announced withdrawal of further guarantees, that DOE may never have been called upon to guarantee loans to pay for that as-yet-unscheduled work.

The question thus becomes, did the agency commit itself to answer to Harbert/Lummus in contract damages even if DOE's refusal to guarantee further loans was a legitimate exercise of its rights against Agrifuels under the guarantee agreement? Or, to state it differently, could the Government create a side-bar agreement with Harbert/Lummus independent of its rights to default Agrifuels? The court holds that it could and did.

The court is persuaded that a promise to the Joint Venture not to suspend the guarantee can be enforced independently of DOE's rights against Agrifuels. DOE was under no prior obligation to make such an independent commitment directly to the construction contractor, with whom it had had no prior contractual relationship. The statement was obviously made for the sole purpose of trying to salvage the entire project. Beckman's and Keefe's words were intended to induce Harbert/Lummus to continue working, and they did. The court views these facts as analogous to those in *United States v. Winstar Corp., et al.*, ___ U.S. ___, 116 S.Ct. 2432, 135 L.Ed.2d 964

(1996), where the Court found that, although the Government had not contracted away its sovereign powers, it had obligated itself to answer in damages in the event it acted inconsistently with binding promises. Here, DOE retained the power to exercise its rights against Agrifuels, but it promised Harbert/Lummus that, if the agency did so, it would compensate the Joint Venture for any detrimental reliance.

The court notes, moreover, that at the same time Beckman and Keefe were trying to induce the Joint Venture to stay on the job, they knew of the bankruptcies of Agrifuels' parent corporations, of the banks' threats to withhold future funding, and of the judgment against Triad. The promise to Harbert/Lummus not to withdraw the guarantee was thus made with an understanding of those events. The court finds that the commitment was, as to Harbert/Lummus, not subject to any rights DOE might have had against Agrifuels arising out of the bankruptcies or the banks' threats to withhold further advances. The only arguably different ground asserted by the agency in August was Agrifuels' default on notes to the banks and that circumstance is obviously factually linked to the banks' previously expressed ultimata.

Finally, the court holds that there is a causal link between breach of the promise and damages. The offer did not invite a promissory acceptance. It was accepted by performance. DOE knew that, irrespective of what the future held, Harbert/Lummus would, if it accepted the offer, incur costs which potentially would never be the subject of a borrowing request the Government would be obligated to guarantee. Moreover, the evidence suggests that the actual participants in the April meetings were

optimistic that an agreement would be reached to salvage the project.

In any event, there is no question that, whatever other pitfalls to project completion might have been ahead as of April, after Secretary Herrington's announcement, the prospects for completion were suddenly zero. The court holds that the Government cannot argue that Agrifuels and the banks would never have prompted a call for further Government guarantees. By preemptively withdrawing its promise to guarantee further loans, it waived that potential argument. The court holds that, absent some other affirmative defense, DOE is liable to Harbert/Lummus for the value of the additional work performed in reliance on the broken promise.

The Authority Question.

The Government asserts that none of the relevant actors had authority to enter into the alleged agreements. It correctly points out that the Government is not bound by the acts of its agents beyond the scope of their actual authority. *Prestex, Inc. v. United States*, 3 Cl.Ct. 373, 377 (1983), *aff'd*, 746 F.2d 1489 (Fed.Cir.1984) (table) (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947)). In addition, "anyone entering into an arrangement with the [G]overnment takes the risk of having accurately ascertained that he who purports to act for the [G]overnment stays within the bounds of his authority." *Id.* Thus, the burden is on the plaintiff to

prove that Keefe had the authority to make the offer.[67] *Shearin v. United States*, 25 Cl.Ct. 294, *aff'd*, 983 F.2d 1085 (Fed.Cir.1992) (table). The fact that Wohadlo may have believed Keefe had sufficient authority is irrelevant.[68] It must be shown that the CO actually had the requisite authority for plaintiff to prevail. *See Edwards v. United States*, 22 Cl.Ct. 411, 421 (1991). For the reasons set forth below, the court holds that the plaintiff has met its burden.

After Michelson was replaced by Keefe, Newman had to issue a new delegation of authority. By this time, all the loan guarantee agreements had been executed and all that remained was the administration of the three ongoing projects.[69] Specifically, he gave Keefe the authority to administer all three agreements and enter into any

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[67] As stated above, the court finds that Keefe was present when Beckman made the statement pledging DOE to guarantee future funding. His acquiescence to this statement amounts to a ratification of the promise made. Therefore, only Keefe's authority to make the statement need be analyzed.

[68] The Government is also bound by implied actual authority, however. *Miller Elevator Co., Inc. v. United States*, 30 Fed.Cl. 662, 693 (1994) (citing *Branch Banking & Trust Co. v. United States*, 120 Ct.Cl. 72, 87, 98 F.Supp. 757, *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951)). "Implied authority binds the Government where a Government representative without actual authority exercises an integral part of the duties assigned to the Government employee." *Id.* (citations omitted).

[69] In addition to the plant in New Iberia, DOE had entered into similar agreements with Ten-Al and the New Energy Company to build alternative fuel plants in other areas of the country.

actions with potential liabilities valued up to and including, but not exceeding $50 million.

The Government argues that Keefe did not have the authority to promise that DOE would fund the project until completion because doing so would constitute an "extraordinary action" for which Keefe had no authority. One of the definitions of an "extraordinary action" is an action that constitutes a waiver respecting any default or termination. Specifically, the Government argues that by promising to guarantee funding until completion, Keefe was in effect promising to waive all of Agrifuels future defaults. Doing so would require the approval of the Director, Procurement and Assistance Directorate, David Newman's boss. Without this approval, therefore, the Government argues that Keefe did not have the authority to promise that DOE would guarantee funds for the project until completion.

While a waiver of rights to default may have exceeded Keefe's authority, the court has already held that was not the substance of the offer. What was promised was that DOE would not withdraw its obligation to guarantee new funds. DOE retained its right to default Agrifuels at any time. The limitation on Keefe's authority with respect to extraordinary events would not be implicated. Under Keefe's general powers, he would have the authority to enter into an agreement, the intent of which was to protect DOE's existing financial exposure by bringing the project to completion.

Enforceability of oral agreements.

As this court's predecessor has previously stated: "[A] separate, prior oral agreement may be valid if it

serves as consideration or inducement for a subsequent written contract and does not vary the terms of the written contract." *Prestex, Inc. v. United States*, 3 Cl.Ct. 373, 378 (1983) (citing *McCloskey v. United States*, 66 Ct.Cl. 105, 127, 1928 WL 2912 (1928)). Therefore, "a prior oral agreement is invalid and unenforceable, if it conflicts with or varies the terms of the subsequent written contract, since all understandings and agreements are considered to have been merged into the subsequent written contract." *Prestex, Inc. v. United States*, 3 Cl.Ct. 373, 378-79 (1983) (citing *Carden v. United States*, 87 Ct.Cl. 189, 201, 1938 WL 4068 (1938)). The court holds, for the reasons set out above, that DOE's promise to Harbert/Lummus was independent of, and did not conflict with, the agency's rights and obligations with respect to Agrifuels and the banks.

Oral agreements are not valid, however, when there is a specific agency regulation requiring that agreements be in writing. *Edwards v. United States*, 22 Cl.Ct. 411, 423 (1991); *see SCM Corp. v. United States*, 219 Ct.Cl. 459, 464, 595 F.2d 595, 598 (1979) (pointing to 32 C.F.R. § 16-103 (1975), which requires the use of Standard Form 30 for amendments of solicitations and the modification of contracts).

Defendant points to 10 C.F.R. § 799.3(j) (1988), as being a DOE regulation requiring all agreements to be in writing. Section 799.3(j), which is grouped in the general provisions of the "Loan Guarantees for Alcohol Fuels, Biomass Energy and Municipal Waste Projects" regulations, states:

> No representation shall be binding on the Department of Energy unless in writing and duly signed by a Contracting Officer and all instruments and modifications thereof shall not be considered as approved by the Department unless signed by a Contracting Officer.

Id. The Government argues that this provision precludes any oral agreements between DOE and the plaintiff.

Plaintiff counters that this section, which is placed under the heading, "Solicitation, evaluation, and approval of applications," does not apply to its alleged agreements. According to plaintiff, Keefe's offer did not involve the issuance of a loan guarantee or the solicitation, evaluation, and approval of applications for guarantees. Those events had already occurred. DOE had already bound itself to guarantee up to 90 percent of all monies advanced (up to the dollar limit). Its relationship with DOE constituted a completely separate and distinct contract outside the scope of the loan guarantee regulatory scheme.

The court agrees with the plaintiff that section 799.3(j) does not apply to the present facts. The alleged oral promises were not made during the "Solicitation, evaluation, and approval of applications." *See* 10 C.F.R. § 799.3. Instead, the agreements were made after the loan guarantee had been issued. There are separate sections within section 799 that deal with project monitoring (section 799.15), and program management and administration (section 799.21). None of these sections contain a provision requiring that agreements be in writing. The court holds that the limitation on oral agreements imposed by section 799.3(j) only applies to agreements

made during the "solicitation, evaluation, and approval of applications" for "Loan Guarantees for Alcohol Fuels, Biomass Energy and Municipal Waste Projects." *See* 10 C.F.R. part 799. Keefe had authority under his general delegated powers to protect the previously-approved project by offering an inducement to Harbert/Lummus to continue working.

Damages

At the time the offer was made, DOE had fully performed on its obligations to guarantee borrowing requests 1 through 18. With respect to the February and March borrowing requests, DOE had approved the disbursements of funds for which it would issue a 90 percent guarantee. Its obligation to guarantee payment was never activated as to those requests because the banks refused to extend further credit. In essence, by anticipatorily breaching, however, the Government prevented itself from being called upon to guarantee future borrowing requests.

The court finds that the Government is only liable for damages resulting from work performed after February 24, but that was not yet authorized according to the payment schedule as of April 9, 1987.[70] This would include both contract work and change order work. The

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[70] The additional limitation is due to the fact that, with respect to the March and earlier guarantee requests, DOE had approved the extension of credit for work done and authorized for payment under the 21-month schedule.

Government is not liable for the bonus payment or any other prior work.

CONCLUSION

The court directs the parties to attempt to determine the correct amount of the judgment and report jointly to the court by September 30, 1996 the results of their discussions.

APPENDIX B

HARBERT/LUMMUS AGRIFUELS PROJECTS, Harbert International, Inc., Abb Lummus Crest, Inc. and Lummus Crest, Inc., Plaintiffs-Cross Appellants,

v.

The UNITED STATES, Defendant-Appellant.

Nos. 97-5047, 97-5052.

United States Court of Appeals,
Federal Circuit.

April 21, 1998.

Rehearing Denied: Suggestion for Rehearing In Banc Declined July 27, 1998.

Edward Smith Allen, Balch & Bingham LLP, of Birmingham, AL, argued for plaintiffs-cross appellants.

Mark A. Melnick, Sr. Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellant. With him on brief were Frank W. Hunger, Assistant Attorney General, and David M. Cohen, Director of counsel on brief was I. Avrum Fingeret, Attorney, U.S. Dept. of Energy, of Washington, DC.

Before SCHALL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and GAJARSA, Circuit Judge.

DECISION

GAJARSA, Circuit Judge.

The United States seeks review of the decision of the United States Court of Federal Claims in *Harbert/Lummus v. United States*, 36 Fed. Cl. 494 (1996), holding that the

United States entered into an oral, unilateral contract with Harbert/Lummus[1] to continue guaranteeing future borrowing requests until completion of a construction project and awarding Harbert/Lummus damages for breach of this contract. Harbert/Lummus cross-appeals, seeking review of the trial court's method of calculating these damages and refusal to recognize the existence of a second contract to accelerate the construction and payment schedule. Because the contracting officer lacked the authority to enter into the oral, unilateral contract and did not ratify the contract, we reverse the decision of the trial court regarding the existence of a binding contract in which the Department of Energy ("DOE") promised not to suspend its guarantee and vacate the trial court's damages award. However, we affirm the trial court's finding that DOE was not contractually bound to an accelerated construction schedule.

BACKGROUND

The facts of this case have been set out in great detail in the trial court's decision and will be referred to in this opinion only to the extent necessary for an understanding of the issues that give rise to this appeal. During the oil crisis in the late 1970's, the federal government investigated alternative sources of energy. Congress passed the Biomass Energy and Alcohol Fuels Act of 1980 (the "Act"), which created the Alcohol Fuels Program (the

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[1] Harbert/Lummus, a joint venture of Harbert International, Inc. and Lummus Crest, Inc., will be treated as a single party for purposes of this case. Throughout the opinion, this party will be referred to as Harbert/Lummus.

"Program") to encourage private companies to design and build alternative fuel energy plants. The Act created the Office of Alcohol Fuels (the "Program Office") within DOE to administer the Program. Specifically, the Program Office was vested with the power to issue government loan guarantees for up to 90 percent of the cost of construction of ethanol and other alternative fuel plants. The Program Office had no independent contracting authority.

One of these loan guarantees was issued to Agrifuels Refining Corporation ("Agrifuels"), which in turn contracted with Harbert/Lummus to construct an ethanol plant. The funds that Agrifuels needed to construct the plant were provided by lending banks and guaranteed by DOE through a loan guarantee agreement and a loan servicing agreement. Harbert/Lummus was not a party to these contracts and was in contractual privity only with Agrifuels through the construction contract. This construction contract provided for a bonus for Harbert/Lummus for early completion and a penalty for late completion.

The construction payment schedule, which was attached to both the construction contract and the loan servicing agreement, called for a 21-month work and payment schedule. During the pre-closing negotiations and after construction began, Harbert/Lummus repeatedly requested that all the parties approve an accelerated 18-month work and payment schedule. Several DOE officials within the Program Office approved of the schedule modification, but later this approval, which was only circulated internally in the Program Office, was withdrawn. The trial court found that the DOE's Contracting

Officer (the "CO") never expressed to Harbert/Lummus an intent to enter into a contract to modify this written schedule. *See Harbert/Lummus v. United States*, 36 Fed. Cl. 494, 512-13 (1996). The trial court held that no contract to accelerate the construction schedule was formed between Harbert/Lummus or Agrifuels and the government. *Id.*

During construction of the plant, Harbert/Lummus stated at a meeting at which all the parties were present that it was not receiving timely payments and that it wanted the accelerated construction schedule to be adopted by the parties. The Deputy Director of the Program Office responded that "DOE was committed to funding the project to completion, and if the contractor completes the project, all the payments would work out in the end." *Id.* at 506. The Deputy Director did not have authority to bind the government. The trial court found that the CO was present at the same meeting, but did not question the offer and was silent after the offer was made. *Id.* The trial court found that the CO adopted the Deputy Director's statement by his silence and created a new, binding unilateral offer to Harbert/Lummus that the government would continue its role as guarantor of future borrowing requests by Agrifuels in exchange for Harbert/Lummus' continued work on the project. *Id.* at 513. When Harbert/Lummus continued work on the project, the trial court held that Harbert/Lummus had accepted DOE's offer, thereby creating a binding contract. *Id.* at 513-14.

Prior to completion of the plant, the ultimate parent companies of Agrifuels declared bankruptcy, triggering an event of default under the loan agreements between Agrifuels and DOE. DOE eventually decided to stop

funding the project and Harbert/Lummus sued for damages for breach of DOE's promise to not withdraw its guarantee until completion of the project. The trial court awarded Harbert/Lummus $2,870,768 in damages for breach of this unilateral contract.

This appeal concerns the alleged formation of two oral contracts. The first contract regards the unilateral offer by the Deputy Director to continue guaranteeing Agrifuels' borrowing requests until completion of the project. The second contract regards the alleged acceptance by DOE of an accelerated construction and payment schedule. With regard to the unilateral contract to continue to guarantee funding, the government argues that the trial court erred in recognizing this contract as binding because (1) the Act and its implementing regulations do not authorize DOE to contract directly with construction contractors, (2) DOE could not enter into this oral contract because of restrictions imposed by statute and regulations, (3) the CO was not delegated the authority to enter into such a contract, and (4) the CO did not ratify the contract. In its cross-appeal, Harbert/Lummus argues that the trial court erred in calculating the damages with respect to DOE's breach of this oral agreement. We need only determine whether the CO had the authority to enter into the oral, unilateral contract and whether he ratified such contract. Harbert/Lummus also argues that the trial court erred in finding that DOE was not bound by a second agreement to accelerate the construction schedule.

DISCUSSION

In reviewing judgments of the Court of Federal Claims, we review conclusions of law de novo and findings of fact for clear error. *See City of El Centro v. United States*, 922 F.2d 816, 819 (Fed.Cir.1990). Because neither party challenges the trial court's findings of fact, we review the trial court's decision with regard to contract formation de novo. *See Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed.Cir.1997) ("In the absence of factual disputes, the question of contract formation is a question of law, reviewable de novo.").

A. The Alleged Contract to Continue Guaranteeing Funding of the Project

It is well established that the government is not bound by the acts of its agents beyond the scope of their actual authority. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); *Trauma Serv. Group*, 104 F.3d at 1325. Contractors dealing with the United States must inform themselves of a representative's authority and the limits of that authority. *See Federal Crop Ins.*, 332 U.S. at 384, 68 S.Ct. at 3. Moreover, "anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority." *Trauma Serv. Group*, 104 F.3d at 1325. The burden was on Harbert/Lummus to prove that the CO had the authority to enter into the oral, unilateral contract. *See id.* The fact that Harbert/Lummus

may have believed that the CO had authority is irrelevant; Harbert/Lummus must prove that the CO had actual authority. *Id.* For the reasons set forth below, we hold that the CO did not have authority to enter into an oral contract to continue to guarantee funding of the project until its completion.

The CO's authority to commit and bind DOE contractually was specifically conditioned in his delegation of authority as follows:

> [The CO] is hereby delegated the authority, with respect to actions valued at $50 million or less, to approve, execute, enter into, modify, administer, closeout, terminate and take any other necessary and appropriate action (collectively, "Actions") with respect to Financial Incentive awards on behalf of the Department of Energy without the prior written approval of or further delegation being necessary from the Director, Office of Procurement Operations (or designee). However, a separate prior written approval of any such action must be given by or concurred in by [the CO] to accompany the action. At that dollar threshold, a specific delegation from the Director, Office of Procurement Operations (or designee) is not required. This delegation shall include the authority to make all required determinations and decisions, except those that are specifically to be made by other authority.

(emphasis added) Thus, the CO's delegation of contracting authority contained a separate and independent provision which required that all actions entered into by him be accompanied by his prior, written approval. Harbert/Lummus directs us to nothing in the record that evidences any separate, prior written approval by the CO of

the oral, unilateral contract. Accordingly, the CO was not authorized to bind the government in disregard of this explicit provision. Harbert/Lummus argues that the CO had implied authority to enter into the unilateral contract and that such a contract was "necessary and appropriate" with regard to his actions relating to the Financial Incentive awards. These arguments are unpersuasive in light of the express mandate in the delegation that the CO agree to any action by prior, written approval. Harbert/Lummus also argues that, because the government does not dispute the CO's authority to enter into a written contract with Harbert/Lummus to care for the plant after DOE ceased its guarantees, the CO must have had the authority to enter into the oral, unilateral contract because both contracts stemmed from the CO's authority to minimize DOE's expenses with regard to the project. Again, this argument is unpersuasive because it does not address the fact that the unilateral contract was oral and did not contain the required written approval.

As we have held before, agency procedures must be followed before a binding contract can be formed. *See American Gen. Leasing, Inc. v. United States*, 218 Ct.Cl. 367, 587 F.2d 54, 57-58 (1978) (holding that express oral agreement with government agent was not binding because, among other factors, applicable regulations required contract to be in writing); *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1080 (Fed.Cir.1989) ("Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then, there is no intent to be bound. Thus, it is irrelevant if the oral assurances emanate from the very official who will have authority at the proper time,

to sign the contract or grant."). It appears evident that, if Harbert/Lummus had examined the CO's delegation of authority, it could not have reasonably believed it had entered into a binding contract with the government in the absence of the required written approval by the CO. Because there is no evidence of such prior, written approval by the CO of the unilateral contract, we hold that the CO lacked the authority to enter into the oral contract and it is therefore not binding upon the government. *See EWG Assocs., Ltd. v. United States*, 231 Ct.Cl. 1028, 1030 (1982) (explaining that the government is not estopped from denying the existence of a contract where the acts upon which the contractor relies are unauthorized); *see also OPM v. Richmond*, 496 U.S. 414, 420-33, 110 S.Ct. 2465, 2469-76, 110 L.Ed.2d 387 (1990) (explaining that the government is not estopped by the unauthorized acts of its agents).

Even if the CO somehow possessed the authority to enter into the oral contract, we hold that he did not ratify it. The trial court found that the Deputy Director, who did not have any contracting authority, actually made the offer to enter into the unilateral contract. Agreements made by government agents without authority to bind the government may be subsequently ratified by those with authority if the ratifying officials have actual or constructive knowledge of the unauthorized acts. *See United States v. Beebe*, 180 U.S. 343, 354, 21 S.Ct. 371, 375, 45 L.Ed. 563 (1901). The Supreme Court has stated that:

> Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts

> upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. . . . If there be want of it, though such want arises from the neglect of the principal, no ratification can be based on any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them.

Id. at 354, 21 S.Ct. at 375.

In our case, the trial court merely found that the CO was present when the Deputy Director made the offer and was silent after the offer was made. There was no finding that the CO even heard the statement. This is not sufficient evidence to support a finding of actual knowledge by the CO of the offer. In addition, the facts as found by the trial court do not support imputing to the CO constructive knowledge of the unilateral contract. The mere fact that Harbert/Lummus continued performing its construction activities would not have put the CO on notice of the existence of a new, unilateral contract because Harbert/Lummus had been performing its construction activities before the offer by the Deputy Director in accordance with its construction contract with Agrifuels. In the absence of either actual or constructive knowledge of the unilateral contract, the CO's silence cannot be a ratification of the unilateral contract. Moreover, ratification must also be based on a demonstrated acceptance of the contract. *See EWG Assocs., Ltd.*, 231 Ct.Cl. at 1030. Silence in and of itself is not sufficient to establish a demonstrated acceptance of the contract by

the CO. *See id.* The silence in this case by the CO was not an assent or acceptance of the oral, unilateral contract.

In addition, as previously discussed, the CO's delegation of authority expressly provided that even a ratification by the CO would have to be in writing. In the absence of such a writing, the CO could not have properly demonstrated his acceptance of the contract. Because we find that the government is not bound by this oral contract to guarantee funding of the project to completion, we reverse the decision of the trial court that there was such a contract and we vacate the trial court's damages award with respect to this alleged contract. We therefore need not reach Harbert/Lummus' argument that such damages were improperly calculated.

B. The Alleged Contract to Accelerate the Construction Schedule

In its cross-appeal, Harbert/Lummus argues that the trial court erred in not recognizing that DOE was contractually bound to an accelerated construction and payment schedule. Harbert/Lummus argues that, although the CO never communicated to Harbert/Lummus or Agrifuels an intent to bind DOE to the accelerated schedule, the non-publicized, internally-circulated approval by several officials within the Program Office, which office did not have authority to bind DOE, was independently effective to bind DOE. Harbert/Lummus also argues that the CO's failure to execute the 18-month schedule change order after the internally-circulated approval was merely a ministerial act and that the non-occurrence of such an act is

insufficient to allow the government to escape contractual liability.

The party alleging the existence of a contract has the burden of demonstrating "a mutual intent to contract including an offer, an acceptance, and consideration." *Trauma Serv. Group*, 104 F.3d at 1325. Harbert/Lummus directs us to no authority for the proposition that DOE can be bound by a contract with Harbert/Lummus or Agrifuels when the CO never communicated to Harbert/Lummus or Agrifuels DOE's intent to enter into a contract to modify the written construction schedule. We agree with the trial court's analysis that, because the CO never expressed its intent to be bound by a contract, Harbert/Lummus has failed to demonstrate that such a contract was formed. We have considered Harbert/Lummus' other arguments with respect to the existence of this contract and find them to be without merit.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court with respect to its recognition of a binding oral, unilateral contract between the government and Harbert/Lummus and therefore we vacate the trial court's damages award for breach of this contract. We affirm the judgment of the trial court with respect to its finding that DOE was not contractually bound to an accelerated construction and payment schedule.

AFFIRMED-IN-PART, REVERSED-IN-PART, and VACATED-IN-PART.

COSTS

Each party to bear its own costs.

APPENDIX C

United States Court of Appeals for the Federal Circuit

97-5047, -5052

HARBERT/LUMMUS AGRIFUELS PROJECTS, HARBERT INTERNATIONAL, INC., ABB LUMMUS CREST, INC. and LUMMUS CREST, INC.,

Plaintiffs/Cross-Appellants,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

(Filed Jul. 27, 1998)

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the CROSS-APPELLANTS and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response to having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 3, 1998.

FOR THE COURT,

/s/ Jan Horbaly awt
Jan Horbaly
Clerk

Dated: July 27, 1998

cc: MARK ARNOLD MELNICK
EDWARD SMITH ALLEN
HARBERT/LUMMUS V US, 97-5047, -5052
(CFC – 93-CV-207)

APPENDIX D

Cost Benefit

Option A – Continue through Acceptance

Salvage	Salvage Value
– Accepted Plant	
.50¢ x 80 M x 90%	$36 M
Costs	
– Disbursement (Govt cost)	11.5 M
– Potential Overruns not covered	
claims (90% x 3 M)	2.7 M
Feedstock (90% x 2 M)	1.8 M
	16.0
Net Benefit	$20 M

Option B – stop at Mechanical Completion

Salvage & Savings	
– Mechanically Complete Plant	
.20¢ x 80 M x 90%	$14.4 M
Savings on Disbursement	11.5 M
[illegible] Int used to buy Feedstock	1.0 M
Draw on Contracts Equity L.C (2.2 x 90%)	2.0
Costs	
– Accrued Interest (90% x 1.4)	1.26
– Contractor Claims for Progress (90% of 9 M)	8.1
– Contractor Claims for Bonus (90% of 2.4)	2.16
	11.52
– Net Benefit	17.38

[to Under Secretary & Secretary 4/2/87
Title: Agrifuels Status Report
Nature: Internal predecisional document exempt: (5)]

AGRIFUELS STATUS

I. Edgington's Position

- Project is not economically viable nor will it be in the foreseeable future
- Based on market Agrifuels can't pay debts and will create substantial losses
- Urged all parties to mitigate losses, continuation would be economically wasteful
- Funding of overruns and ineligible costs at risk
- Did not put up $400K Bond required by electric company

II. Marketing

- Ethanol Corp. Presentation
- 1.2M gallons per month and falling
- Labeling law gives ethanol no chance in Louisiana
- If law repealed, 8M gallons per month potential
- Would take 1 year to bring market back
- State max production 8-10M gallons per month

III. Acceptance

- Performance Test scheduled for 4/23/87, Acceptance 4/30/87
- 99% complete

IV. Banks – Position on future disbursements

- Working capital issue not solved
- Uncertainity [sic] of Edgington's behavior
- Banks want third party to collateralize undisbursed portions ($635K of 5% nonguarnateed [sic] Note C)
- Banks want entire disbursement released now
- would allow expiring (4/13/87) Letter of Credit on 5% nonguaranteed Note B to be drawn
- Funds could be held in disbursement account for payment of costs incurred

B. Stop all disbursements now, pay off guaranteed notes and foreclose

Pros

- Could save $11.5 million in undisbursed guaranteed funds if contractor is not paid for progress to date
- Would eliminate risk of unpaid overruns if Edgington does not live up to its obligations
- Plant is essentially mechanically complete

- Incremental value of plant at acceptance may not be worth additional cost, especially if conversion of plant to corn is necessary to be economic

Cons

- Would lose any added value plant acceptance would bring
- DOE would probably be sued for $9 Million in undisbursed funds for which progress has been achieved and also possibly $2.4 Million in lost contractor bonus
- Construction Joint Venture is also 80% owner of Tennol and it could affect willingness to continue to put money into that project
- Immediate expenses would be incurred for mothballing
- Would let Edgington off the hook for its contractual obligations
- Would lose contractor and vendor guarantees and warranties
- If plant is foreclosed, disposal would probably be done under GSA disposal procedures, resulting in delays and decrease of recovery value
- Any chance for operation would be lost

Net cost to DOE, Case A	$48,094,784
Net cost to DOE, Case B	61,927,355
Difference	$13,832,571

See attached Cost Analysis

- Molasses is too expensive as a feedstock to operate without subsidy

- Good possibility that most buyers would want to convert to corn at a cost of up to $30 Million

A. If Joint Venture provides collateral for the 5% note, make disbursement and continue project through Acceptance

Pros

- Completion of plant would enhance value by proving that systems and processes work and contractor's warranties are in force

- Chance for continued operation still alive. Value would be enhanced even more if plant can continue operating.

- Would allow time to find buyer

- Bank thinks plant could be run at low production level until market improves

- Could allow time to get labeling law removed

- Would allow for orderly shutdown of plant if necessary and cooperation of Joint Venture

- Would allow for payment of contractor for progress to date, eliminating potential of lawsuits

- Would keep Edgington on the hook

Cons

- If new Agrifuels Board decides to continue project it could be replaced by Edgington and project could be sabotaged
- Would increase Government's exposure by $11.5 million (but most can be offset by potential contractor progress claims)
- Would continue risk of unpaid overruns for which Edgington is legally liable through Acceptance
- Continuation beyond Acceptance requires working capital depending on level of production

B. Stop all disbursements now, pay off guaranteed notes and foreclose

Pros

- Could save $11.5 million in undisbursed guaranteed funds if contractor is not paid for progress to date
- Would eliminate risk of unpaid overruns if Edgington does not live up to its obligations
- Plant is essentially mechanically complete
- Incremental value of plant at acceptance may not be worth additional cost, especially if conversion of plant to corn is necessary to be economic

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Net cost to DOE, Case A	$48,094,784
Net cost to DOE, Case B	61,927,355
Difference	$13,832,571

See attached Cost Analysis

Case A: Joint Venture agrees to guarantee $639,000 balance of Note C; remander [sic] of $12,791,246 in loans is made immediately; plant is completed, accepted and sold after acceptance

Proceeds from sale of plant:	
Sales price @ 50 cents on the dollar .5 x $80,000,000	$40,000,000
Budget overruns*	(5,000,000)
Contractor's bonus	(2,400,000)
Budget underruns	3,000,000
Expenses of Servicer in foreclosing and selling plant @ 5% of sales price	(2,000,000)
Interest expense on Notes A and C @ $520,000/month, 2 months (May, June)	(1,040,000)
Net proceeds to secured parties	$32,560,000
DOE liability on Note A	$78,941,100
Less: DOE's share of sale proceeds @ 90/95	30,846,316
Net Cost to DOE	$48,094,784

Case B: No further disbursements, pay off Note A, foreclose, sell plant, pay off secured parties

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* Liability of Edgington Oil, but they may refuse to pay. DOE would have to sue for recovery

Proceeds from sale of plant:		
Sales price @ 20 cents on the dollar .2 x $80,000,000		$16,000,000
Balance of equity LC		2,248,238
Balance in disbursement account		1,000,000
Liability to Joint Venture:		
Fixed price	$ 9,000,000	
Change orders	3,000,000	
Bonus	2,400,000	
	$14,400,000 x 75%	(10,800,000)
Expenses of Servicer in foreclosing and selling plant @ 5% of sales price		(800,000)
Interest Expense on Notes A + C, accruing @ $447,000/month, 3 months (March, April, May)		(1,341,000)
Cost of mothballing plant		(500,000)
Net proceeds to secured parties		$ 5,807,238
DOE liability on Note A		$67,428,949
Less: DOE's share of sale proceeds @ 90/95		5,501,594
Net Cost to DOE		$61,927,355

[LOGO] **HARBERT INTERNATIONAL, INC.**

[Name And Address Omitted In Printing]

March 3, 1987

Mr. Patrick Hamilton
AGRIFUELS REFINING CORPORATION
Post Office Box 9130
New Iberia, Louisiana 70560

Gentlemen:

We want to restate our position as Contractor under the Engineering, Procurement and Construct Contract with Agrifuels Refining Corporation for the ethanol plant in New Iberia, Louisiana. Despite our cooperation with all parties and our performance (early completion) to date, neither the Bank, Department of Energy, nor the Owner has indicated by their action any desire to cooperate with the Contractor.

As a result, Harbert/Lummus, who is only a contractor and plant operator on this project, is owed a substantial amount of money as follows:

18-Month Schedule

> We are due $4,254,228 which is the difference between the amount we have been paid under Exhibit L of the Payment Schedule and the actual progress as certified by the Construction Monitor. We have been building this plant on an 18-month construction schedule since work began. We have repeatedly requested in writing a change order to modify the 21-month payment schedule to the actual 18-month construction schedule. We understood at Tuesday's meeting that the DOE has reviewed and approved this

change order, and it is on the Secretary's desk for signature.

Neither the DOE nor the Servicer will commit as to when this change order would be signed by the Secretary. We have never been told that the change order would not be signed and that the Owner, Servicer, or Secretary was not interested in the early completion of this project. We agreed to a 21-month payment schedule only after the assurances of Agrifuels and the Servicer that there would be no problems modifying this to an 18-month pay schedule if such progress was actually obtained. In reliance upon that assurance, we accelerated construction on an 18-month basis. The Construction Monitor has certified that this accelerated construction has been accomplished!

However, for some reason, the Owner, Servicer, and Secretary have not agreed to a change order as promised, in spite of the fact that the DOE and Servicer at Tuesday's meeting authorized early disbursement of start-up funds in recognition of the early completion. This approaches bad faith on the part of the Banks and DOE to the Contractor. We expect the DOE to approve the revised schedule and to pay the difference between the actual completion versus the 21-month schedule by an interim disbursement no later than March 15, 1987.

Feedstock Purchase

At a point in time during the "staging" of the feedstock storage tank foundations, we needed molasses sufficient to fill these tanks. Under the terms of our Contract, Agrifuels is obligated to furnish that molasses. They did not have the

money to buy the molasses and asked Harbert/ Lummus to purchase it. We have purchased $1,268,097 in molasss which is currently on storage in these tanks. Agrifuels has promised to pay for this molasses as used in the start-up. This molasses must be paid for in cash prior to its use, and this is not done, we will not release the molasses for use and submit a claim for Owner-induced schedule delay.

Sales Tax

Under the terms of the Contract, Harbert/ Lummus is to be reimbursed for any sales tax paid on this project. We have invoiced Agrifuels for $1,006,746. At the meeting Tuesday, we were advised that Agrifuels would not pay us until they were reimbursed by Louisiana. This is contrary to the terms of the Contract. We expect to be paid for this sales tax within thirty (30) days of presentation of our invoice. If we are not paid, we will perfect liens on the facility to secure our position.

Start Up/Operating Supplies

In order to start up the facility, we were required to buy certain materials, including bacteria, sludge, and other chemicals. Agrifuels has indicated in writing that they will not purchase these materials. The Contract clearly requires the Owner to furnish these materials. We have purchased the bacteria and sludge and filed for arbitration against Agrifuels. We will not purchase any more feedstock, operating supplies, or chemicals necessary to start up the plant. Harbert/Lummus will expend approximately $798,700 for the bacteria and sludge, and we expect to be paid by Acceptance. If Agrifuels

does not purchase all necessary start-up and operating supplies and this delays start-up and Acceptance testing, we will submit a claim for Owner-induced delays.

Change Orders

We have submitted Change order Nos. 10 and 8 for a total of $266,000. The exact status of payment for these amounts is unknown. We expect prompt action on these change orders.

Late Payment Interest

We are due interest at prime plus ½% on the late payment of the December Progress Payment. Payment is due on the next to last day of the month. Actual payment was made on February 12, thirteen days late.

Progress Payment

Our January Progress Payment (based on 21-month schedule including the change order for sales tax) is $4,515,241. This was due to be paid by Thursday, February 26.

Early Completion Bonus

Despite the efforts of the Owner to the contrary, the Contractor will be ready for an Acceptance test based on the early completion schedule. The Owner has been clear in its intent to delay Acceptance, while maximizing commercial production, at the expense of the Contractor. The Harbert/Lummus Joint Venture will not allow itself to be used in this fashion and will rely upon its contractual rights and legal remedies to the fullest extent possible to protect its rights.

This is to advise you if all these amounts currently due and payable are not paid with the next Progress Payment, Harbert will notify the Department of Energy that within 5 days, Harbert/Lummus will use its full rights under the Contract to protect itself.

During the meeting on Tuesday, the Servicer informed Agrifuels that it was in default under the terms of the Loan Agreement and that no further payments would be made unless the Banks and Agrifuels could agree on the source of additional working capital and other legal matters. Agrifuels responded that it had no money, and its parent, Edgington Oil, was legally prevented from providing any working capital. The other parents of Edgington Oil are in Chapter 11 Bankruptcy. Because of the notice to us that the Servicer will not fund the next invoice, we anticipate that there will be a breach of the payment provisions of the Construction Contract entitling us to stop work. For this reason, we must have payment of all amounts due and owing to Harbert/Lummus with the next construction draw.

Very truly yours,

/s/ Leonard R Wohadlo
Leonard R. Wohadlo

LRW/bh

Certificate of Appointment

Under authority vested in the undersigned and in conformance with Subpart 1.6 of the Federal Acquisition Regulation

THOMAS S. KEEFE

is appointed

Contracting Officer

for the

United States of America

Subject to the limitations contained in the Federal Acquisition Regulation and to the following:

Department of Energy Acquisition Regulation Contract Specialist Guide, Topics A1.603 and A971.1

Unless sooner terminated, this appointment is effective as long as the appointee is assigned to:

DIVISION DIRECTOR

APPOINTMENT APPLICABLE FOR:

ACQUISITION CONTRACTS
ASSISTANCE INSTRUMENTS
FINANCIAL INCENTIVES AGREEMENTS
SALES CONTRACT

Office of Procurement Operations
(Organization)

U.S. Department of Energy
(Agency/Department)

/s/ David G. Newman
David G. Newman, Director
(Signature and Title)

October 15, 1986
(Date)

12
(No.)

DEPARTMENT OF ENERGY
DELEGATION ORDER NO: 0204-98
TO THE ASSISTANT SECRETARY,
MANAGEMENT AND ADMINISTRATION

Pursuant to the authority vested in me as Secretary of Energy ("Secretary") and Section 642 of the Department of Energy Organization Act (P.L. 95-91) there is hereby delegated to the Assistant Secretary, Management and Administration, on a non-exclusive basis, the authority to:

1. Establish hours of duty and administrative work week for Department of Energy (DOE) Headquarters and for field organizations that do not have such authority.

2. Approve Federal Labor-Management Agreements.

3. Approve personnel actions involving positions at the GS-15 level and below or equivalent levels.

4. Approve personnel actions relating to the appointment of experts and consultants pursuant to Section 3109 of title 5 of the United States Code (Schedule A Authority).

5. Approve actions relating to the establishment of confidential or policy determining positions (Schedule C Authority).

6. Serve as Executive Secretary of the Executive Personnel Board.

7. Approve Headquarters organization changes at the third and fourth level (offices and divisions or equivalent) and approve field organization changes at the second level (Assistant Managers or equivalent).

8. Enter into, approve, administer, modify, close-out, terminate, and take such other action as may be necessary and appropriate with respect to any procurement contract, sales contract, interagency agreement, financial assistance agreement, financial incentive agreement or other similar action binding the Department of Energy to the obligation and expenditure of public funds or to the sale of products and services. Such action shall include the rendering of approvals, determinations and decisions, except those required by law or regulation to be made by other authority.

9. Serve as the Senior Procurement Official, Headquarters, to whom authority for extraordinary contractual actions to facilitate the national defense pursuant to P.L. 85-804 and Executive Order 10789, as amended, is delegated by 41 CFR 9-17.101(b)(1).

10. Establish dollar threshold amounts or other limitations for DOE Headquarters and field activities to observe when entering into and approving procurement contracts, interagency agreements, financial assistance agreements, financial incentive agreements, sales contracts or similar agreements.

11. Designate contracting officers.

12. Acquire, manage and dispose of personal property held by the Department for official use by its employees or contractors.

13. Sign applications for permits to procure tax-free spirits from a distilled spirits plant for non-beverage purposes for use by the Department, as authorized by 26 USC 5271 and 27 CFR 213.142.

14. Designate to the Treasury Department those DOE employees who will serve as certifying officers and agent/imprest fund cashiers.

15. Appoint officials authorized to certify financial statements to Treasury, other Federal agencies and to Congress as required by law or regulation. This authority may not be redelegated.

16. Establish, approve and issue financial plans and allotments for all components of DOE and make disbursements pursuant thereto.

17. Establish, approve and implement systems of administrative financial controls to restrict expenditure obligations of components of DOE to the amount of apportionments to such components, and to establish, approve and implement systems of administrative financial controls to ascertain responsibility for the creation of all such expenditure obligations.

18. Approve exceptions to the full-cost recovery pricing policy.

19. Sign all documents and take such other action as may be necessary and appropriate for the submission for publication to the Federal Register, where the authority to sign such documents has not otherwise been delegated to other officers of the Department of Energy.

20. Report violations of the Anti-Deficiency Act (31 U.S.C. 665) and act in the name of the Secretary for the purpose of enforcing the Anti-Deficiency Act within the Department.

21. Determine that utilization of the authority contained in Section 101(c) of the Defense Production Act of 1950, as amended, will "maximize domestic energy supplies," as contemplated by

Section 2(b) of Defense Mobilization Order 13. This determination will be made after consultation with the General Counsel and the Director of Policy, Planning, and Analysis.

22. Find that certain supplies of material or equipment are critical and essential to maintain or to increase exploration for energy supplies or their production, refining, transportation or conservation or to construct and to maintain energy facilities, as described in Section 101(c)(3)(A) of the Defense Production Act of 1950, as amended.

23. Approve Departmental Directives.

24. With the concurrence of the General Counsel, request from the General Services Administration ("GSA") that the Secretary of Energy be authorized to intervene in proceedings relating to utility matters before any Federal or State regulatory agency or commission in order to represent the consumer interests of Executive Agencies of the Federal Government in such proceedings; and to intervene in such proceedings pursuant to an authorization received from GSA, subject to the concurrence and with the assistance of the General Counsel.

25. Approve acquisitions of automatic data processing and telecommunications equipment.

26. Designate the DOE Freedom of Information Act and Privacy Act Officers.

27. Take all necessary actions to acquire, by purchase, lease, or otherwise, real property and interests therein; take necessary additional actions following the initiation of condemnation proceedings and the execution of declarations of taking; and exercise all authority of the Secretary regarding the management and disposal of

Departmental real estate. This authority does not extend to initiation of condemnation proceedings or execution of declarations of taking.

28. Issue rules and regulations as necessary and appropriate to carry out the authorities in this delegation except that this authority may be redelegated only to the heads of organizations reporting to the Assistant Secretary and may not be further redelegated.

29. Take such other action as the Secretary or his authorized delegate(s) may, from time to time, direct or authorize.

The authority delegated to the Assistant Secretary, Management and Administration may be further delegated, in whole or in part, as may be appropriate, except as specifically prohibited in this delegation.

In exercising the authority delegated by this Order the delegate shall be governed by the rules and regulations of DOE and the policies and procedures prescribed by the Secretary or his delegate.

The authorities delegated in this Order are in addition to, and not in limitation of, any authorities delegated or responsibilities assigned to the Assistant Secretary, Management and Administration by any other DOE delegation, written or oral, or by any Departmental Directive, regulation, or other issuance.

All actions pursuant to any authority delegated prior to this Order or pursuant to any authority delegated by this Order taken prior to and in effect on the date of this Order are hereby confirmed and ratified, and shall remain in full force and effect as if taken under this Order, unless or until rescinded, amended or superseded.

Nothing in this Order shall preclude the Secretary from exercising any of the authority so delegated

whenever in his judgment the exercise of such authority is necessary or appropriate to administer the functions vested in him.

Delegation Orders No. 0204-5, 0204-6, 0204-7, 0204-9, 0204-73, and 0204-74 are hereby rescinded.

This order is effective June 14, 1982.

/s/ James B. Edwards
James B. Edwards
Secretary of Energy

DATE: June 14, 1982

U.S.DEPARTMENT OF ENERGY
memorandum

SUBJECT: Approval of Departmental Directives

TO: Assistant Secretary, Management and Administration

By Order dated June 14, 1982, I have delegated to you the authority, inter alia, to approve Departmental Directives. This authority is consistent with the responsibilities of your position, but, because other officials of the Department are often directly affected by the substance of Directives, you shall utilize the following procedures for resolving nonconcurrences by other Secretarial Officers: When you are unable to resolve a nonconcurrence by another Secretarial Officer in a Directive directly involving that official's area of responsibility, or by the General Counsel, you shall refer the disagreement to the Secretary for resolution.

/s/ James B. Edwards
James B. Edwards
Secretary

DEPARTMENT OF ENERGY
ASSISTANT SECRETARY, MANAGEMENT
AND ADMINISTRATION
REDELEGATION ORDER NO: 0204-98.1
TO THE DIRECTOR, PROCUREMENT AND
ASSISTANCE MANAGEMENT

Pursuant to the authority vested in me by the Secretary of Energy there is hereby delegated to the Director, Procurement and Assistance Management (the Senior Procurement Official) the following specific authorities:

1. Enter into, approve, administer, modify, close-out, terminate, and take such other action as may be necessary and appropriate with respect to any procurement contract, sales contract, interagency agreement, financial assistance agreement, financial incentive agreement or other similar action binding the Department of Energy to the obligation and expenditure of public funds or to the sale of products and services. Such action shall include the rendering of approvals, determinations and decisions, except those required by law or regulation to be made by other authority and the issuance of regulations to carry out the functions and authorities of this delegation.

2. Serve as the Senior Procurement Official, Headquarters, to whom authority for extraordinary contractual actions to facilitate the national defense pursuant to P.L. 85-804 and Executive Order 10789, as amended, is delegated by 41 CFR 9-17.101(b)(1). The authority conferred by this paragraph shall not be used to obligate the United States in an amount in excess of $50,000 without approval of the Assistant Secretary, Management and Administration.

3. Establish dollar threshold amounts or other limitations for DOE Headquarters and field activities to observe when entering into and approving procurement contracts, interagency agreements, financial assistance agreements, financial incentive agreements, sales contracts or similar actions.

4. Designate contracting officers.

5. Acquire, manage and dispose of personal property held by the Department for official use by its employees or contractors.

6. Sign applications for permits to procure tax-free spirits from a distilled spirits plant for non-beverage purposes for use by the Department, as authorized by 26 U.S.C. 5271 and 27 C.F.R. 213.142.

7. Determine that utilization of the authority contained in Section 101(c) of the Defense Production Act of 1950, as amended, will "maximize domestic energy supplies", as contemplated by Section 2(b) of Defense Mobilization Order 13. This determination will be made after consultation with the General Counsel and the Director of Policy, Planning, and Analysis.

8. Find that certain supplies of material or equipment are critical and essential to maintain or to increase exploration for energy supplies or their production, refining, transportation or conservation or to construct and to maintain energy facilities, as described in Section 101(c)(3)(A) of the Defense Production Act of 1950, as amended.

9. Sign all documents relating to procurement contracts, sales contracts, interagency agreements, financial assistance agreements, financial incentive agreements and similar agreements and

related regulations and take such other action as may be necessary and appropriate for the submission for publication to the Federal Register.

10. Take such other action as the Assistant Secretary, Management and Administration or his authorized delegate(s) may, from time to time, direct or authorize.

The authority delegated to the Director, Procurement and Assistance Management may be further delegated, in whole or in part, as may be appropriate.

In exercising the authority delegated by this Order the delegate shall be governed by the rules and regulations of DOE and the policies and procedures prescribed by the Assistant Secretary, Management and Administration or his delegate.

The authorities delegated in this order are in addition to, and not in limitation of, any authorities delegated or responsibilities assigned to the Director, Procurement and Assistance Management by any other DOE delegation, written or oral, or by any Departmental Directive, regulation, or other issuance.

All actions pursuant to any authority delegated prior to this Order or pursuant to any authority delegated by this Order taken prior to and in effect on the date of this Order are hereby confirmed and ratified, and shall remain in full force and effect as if taken under this Order, unless or until rescinded, amended or superseded.

Nothing in this Order shall preclude the Assistant Secretary, Management and Administration from exercising any of the authority so delegated whenever in his

judgment the exercise of such authority is necessary or appropriate to administer the functions vested in him.

This order is effective June 14, 1982.

/s/ William S. Heffelfinger
William S. Heffelfinger
Assistant Secretary
Management and
Administration

DEPARTMENT OF ENERGY
Acting Director, Office of Alcohol Fuels
Delegation Order No. ___

TO THE DEPUTY DIRECTOR, OFFICE OF ALCOHOL FUELS

Pursuant to the authority delegated to me by the Secretary of Energy in Delegation Order No. ___, there is hereby delegated to the Deputy Director of the Office of Alcohol Fuels, on an exclusive basis, the authority to:

1. Carry out the functions vested in the Secretary of Energy by Subtitle A of Title II of the Energy Security Act (ESA), Pub. L. 96-296, except those functions whose redelegation is prohibited by Delegation Order No. ___.

2. Carry out the day-to-day management of the Office of Alcohol Fuels.

Only the authority delegated in paragraph 2 of this Order may be further delegated, in whole or in part, within the Office of Alcohol Fuels.

In exercising the authority delegated by this Order, the delegate shall be governed by the rules and regulations of the Department of Energy and the policies and procedures prescribed by the Secretary or his delegates.

All actions pursuant to any authority delegated prior to this Order or pursuant to any authority delegated by this Order taken prior to and in effect on the date of this Order are hereby confirmed and ratified, and shall remain in full force and effect as if taken under this Order, unless or until rescinded, amended or superseded.

Nothing in this Order shall preclude the Acting Director of the Office of Alcohol Fuels from exercising any of the authority so delegated whenever in his judgment the exercise of such authority is necessary or appropriate to administer the functions vested in him.

This Order is effective _____.

/s/ Joseph J. Tribble
Acting Director
Office of Alcohol Fuels

memorandum

ATTACHMENT B
A1.603
Page 1 of 4

APR 25, 1986

MA-441

Delegation of Authority/Designation Head of Contracting Activity (HCA)

Director, Office of Procurement Operations

Department of Energy (DOE) Redelegation Order 0204-98.1 sets forth various authorities delegated to the Director, Procurement and Assistance Management Directorate (Director), and provides that these authorities may be further redelegated in whole or in part as may be deemed appropriate. This memorandum serves to redelegate to you the specific authority to:

ACQUISITION

Approve, enter into (award/execute), administer, modify, close out, terminate, and take such other actions as may be necessary and appropriate with respect to any contractual arrangement (including interagency and other funds-out agreements) committing the Department of Energy to the obligation and expenditure of public funds: provided, the execution of such actions conforms with applicable laws, regulations, orders, and procedures including those determinations and decisions as required or described in the Department of Energy Acquisition Regulation; provided further, any such action (other than a funding modification) of $20,000,000 or more, including the value of all priced options or estimates of unpriced options

and any contractor cost share or in-kind contributions shall have the prior approval, or waiver thereof, of the Director or designee except that in the case of a subcontract consent/approval action this amount shall be $25,000,000; provided further, that any competitive solicitation intended to result in award of a contract or multiple contracts having a total value of $10,000,000 or more shall also have the prior approval, or waiver thereof, of the Director or designee. This authority may be redelegated, with the power of further redelegation.

Designate Competition Advocates for each installation that has been delegated contracting authority and reports to you as HCA to perform those duties required by the Competition in Contracting Act of 1984, 98 Stat 1175 et. seq. (Public Law 98-369), provided such designation, if below the GM-15 level, shall be approved by me. This authority may not be redelegated.

Exercise the determination required by the Federal Acquisition Regulations, in the case of Mistake in Bids alleged after opening of bits [sic] and before award, and make all administrative determinations regarding withdrawal of bids. This authority may not be redelegated.

ASSISTANCE

Approve, enter into (award), administer, modify, close out, terminate, and take such other actions as may be necessary and appropriate regarding financial assistance and financial incentive instruments, including but not limited to grants, cooperative agreements, loans and loan guarantees, price support and guarantee market agreements, committing the Department to the

obligation and expenditure of public funds; provided such actions conform with applicable laws, policies, regulations and procedures; provided further, any grant or cooperative agreement action of $20,000,000 or more including any performer cost share or in-kind contribution and all actions for a loan and loan guarantee, price support, guaranteed market agreement, and all other such financial incentive actions exceeding $50,000,000 shall have the prior approval, or a waiver thereof, of the Director or designee; provided further, any solicitation document which may result in a financial assistance or incentive award or multiple awards with a collective value of $20,000,000 or more shall also have the prior approval, or waiver thereof, of the Director or designee. This authority may be redelegated, with the power of further redelegation, provided that no award for any loan, loan guarantee, price support, guaranteed market agreement, or any other such financial incentive action is made without your prior approval or the prior approval of one acting for you in your absence.

Perform the authorities contained in Paragraph A of the December 9, 1982, Delegation of Authority with Respect to Loan Guarantee Agreement-Alcohol Fuels Energy Protects; provided, actions defined therein as modification to such agreements involving extraordinary actions shall have the prior approval or waiver thereof of the Director, Office of Alcohol Fuels.

Submit to the *Federal Register* for publication all notices of financial assistance solicitations. This authority may be redelegated one level below that of the HCA, without the power of further redelegation.

SALES

Approve, enter into, and take such other actions as may be necessary and appropriate, with respect to agreements committing the Department to the sale of products and services, including funds in interagency agreements and other agreements providing for reimbursable work for others; provided, such agreement:s [sic] are made pursuant to any applicable laws, Executive orders, regulations, and directives governing policies and procedures; provided further, all reimbursable work for others shall have been authorized by the designated official responsible for such work, and statutory, other legal, and regulatory authority to perform the reimbursable work exists. This authorization may be redelegated with power of further redelegation.

PROPERTY

Manage and dispose consistent with applicable laws, regulations, policies and procedures, all personal property held by DOE for official use by departmental employees, contractors, and recipients. This authority may be redelegated.

CONTRACTING OFFICERS

Appoint Contracting Officers or acquisition, assistance and sales actions in accordance with DOE Order 4200.4.

Having been delegated the authorities prescribed above for the award of acquisition, assistance, and sales instruments as well as appoint contracting officers to help carry out these authorities, you are also designated as an HCA

for performance of those functions and duties specifically reserved to an HCA or designee as may be appropriate. The following DOE organizations are designated Contracting Activities and shall report to you as HCA.

Office of Procurement Operations
Naval Petroleum Reserves in California
Naval Petroleum and Oil Shale Reserves in Colorado, Utah, Wyoming

The authorities redelegated by this memorandum are in addition to, and not in limitation of, any other authorities delegated or responsibilities assigned to your office orally or in writing, or by any Departmental directive, regulation, or other issuance.

All actions pursuant to any authority delegated prior to this redelegation or pursuant to any authority redelegated herein taken prior to and in effect on the date of this redelegation are hereby confirmed and ratified, and shall remain in full force and effect as if taken under this redelegation, unless or until recinded [sic], amended or superseded.

Nothing in this redelegation shall preclude the Director, Procurement and Assistance Management Directorate, from exercising any of the Director's authority whenever in the Director's judgement the exercise of such authority is necessary or appropriate to administer the functions vested in that position.

This delegation is effective immediately, and supersedes all previous delegation memoranda issued to your office by this office on the above authorities.

Berton J. Roth, Director
Procurement and Assistance
Management Directorate

Attachment
cc: Director, Office of Alcohol Fuels

United States Government Department of Energy

memorandum

DATE: September 25, 1985

REPLY TO
ATTN OF: MA-454 (F. Madison)

SUBJECT: Alcohol Fuels Loan Guarantee Program – Agrifuels Refining Corporation

TO: Stephen J. Michelsen, Director
Financial Incentives Operations
Division

The DOE Order 5700.5 established general policy guidelines and management procedures for all authorized financial incentives programs of the Department including loans, loan guarantees, purchase agreements, price supports, and others which may evolve.

Pursuant to the various authorities previously delegated to the Director, Office of Procurement Operations by Delegation of Authority and Delegation of Authority with Respect to Loan Guarantee Agreement – Alcohol Fuels

Energy Projects, each dated December 9, 1982, respectively, and specifically, the Agrifuels Refining Corporation Loan Guarantee Delegation dated 05/21/85, each attached hereto, I hereby provide the following transaction approval and delegation of authority:

(1) Based upon review of the draft Closing Report dated May 10, 1985, draft Loan Guarantee Agreement, related documents, and briefings received on the Alcohol Fuels Loan Guarantee Program – Agrifuels Refining Corporation Loan Guarantee Agreement is hereby approved for execution and closure on behalf of the U.S. Department of Energy.

(2) The following authority is delegated to Mr. Stephen J. Michelsen, being a duly appointed Contracting Officer.

Mr. Michelsen is hereby delegated authority to enter into, and take such other action(s) as may be necessary and appropriate to fully execute and close the Agrifuels Refining Corporation Loan Guarantee Agreement, and related documents on behalf of the U.S. Department of Energy. Delegated authority shall be pursuant to applicable laws, Executive orders, regulations, directives, policies, and procedures.

(3) In the event of Mr. Michelsen's absence from official duty, the authority to enter into, and take such other action(s) as may be necessary and appropriate to fully execute and close on behalf of the U.S. Department of Energy, the Agrifuels Refining Corporation Loan Guarantee Agreement,

and related documents, shall revert to Mr. David G. Newman.

This delegation of authority is subject to the following limitations:

(1) This delegation of authority does not extend to those actions defined as "extraordinary actions" set forth in Section A2 of the Delegation of Authority with Respect to Loan Guarantee Agreement – Alcohol Fuels Energy Projects dated December 9, 1982, and attached hereto.

(2) This delegation of authority, in addition, for purposes of agreement administration, covers only those actions with potential liabilities valued up to and including but not exceeding $25 million.

This delegation of authority is not subject to re-delegation and shall remain in full force and effect until rescinded.

/s/ David G. Newman
David G. Newman
Director
Office of Procurement Operations

3 Attachments

United States Government Department of Energy

memorandum

DATE: NOV 15 1986

REPLY TO
ATTN OF: MA-454

SUBJECT: Alcohol Fuels Loan Guarantee Program

TO: Thomas S. Keefe, Director
Financial Incentives Operations Division

Fred T. Madison
Financial Incentives Operations Division ←

DOE Order 5700.5 establishes general policy guidelines and management procedures for all authorized financial incentives programs of the Department including direct loans, loan guarantees, purchase agreements, price supports, guaranteed market agreements and any others which may evolve (hereinafter referred to as "Financial Incentives").

This delegation is effective immediately and supersedes paragraph B of the Delegation of Authority with Respect to Loan Guarantee Agreements – Alcohol Fuels Energy Projects dated December 9, 1982, and in the case of Mr. Madison the delegation of Contracting Officer authority dated May 9, 1986.

I hereby make the following delegations:

1. Mr. Thomas S. Keefe, being a duly appointed Contracting Officer, is hereby delegated the authority, with respect to actions valued at $50 million or less, to approve, execute, enter into, modify, administer,

closeout, terminate and take any other necessary and appropriate action (collectively, "Actions") with respect to Financial Incentive awards on behalf of the Department of Energy without the prior written approval of or further delegation being necessary from the Director, Office of Procurement Operations (or designee). However, a separate prior written approval of any such action must be given by or concurred in by Mr. Keefe to accompany the action. At that dollar threshold, a specific delegation from the Director, Office of Procurement Operations (or designee) is not required. This delegation shall include the authority to make all required determinations and decisions, except those that are specifically to be made by other authority.

With respect to his authority involving potential liabilities in excess of $50 million, Mr. Keefe may take any of the above Actions, except that, prior to the taking of any Action, he must obtain a specific written approval of the delegation of authority from the Director, Office of Procurement Operations (or designee).

2. Mr. Fred Madison, being a duly appointed Contracting Officer, is hereby delegated the authority, with respect to actions valued at $5 million or less, to approve, execute, enter into, modify, administer, closeout, terminate, and take any other necessary action (collectively, "Actions") with respect to Financial Incentive awards on behalf of the Department of Energy without the prior written approval of or further delegation being necessary from the Director, Office of Procurement Operations (or designee). However, a separate prior written approval of any such action must be given by or concurred in by Mr. Madison to accompany the action. At that dollar threshold a specific delegation from the Director,

Office of Procurement Operations (or designee) is not required. This delegation shall include the authority to make all required determinations and decisions, except those that are specifically to be made by other authority.

With respect to his authority involving potential liabilities in excess of $5 million, Mr. Madison may take any of the above Actions, except that, prior to the taking of any Action, he must obtain a specific written approval of and delegation of authority from the Director, Office of Procurement Operations (or designee).

The delegation is subject to the review and approval constraints of DEAR Part 971.

The authorities delegated herein may be redelegated in whole or in part in accordance with applicable laws, regulation, acquisition letters, financial assistance letters, and directives, as may be appropriate.

The exercise of the authority delegated herein or as redelegated pursuant hereto shall be governed by the rules and regulations of the Department of Energy and policies and procedures prescribed by the Secretary or his delegate(s).

All actions taken prior to this delegation in effect on the date hereof and for which authority has been delegated herein are hereby confirmed and ratified and shall remain in full force and effect as if taken under this delegation, unless or until rescinded.

/s/ David G. Newman
David G. Newman
Director
Office of Procurement Operations

3.0 STARTUP

Startup activities continued in the Waste Water Treatment Plant. Deliveries of seed from Bacardi's Puerto Rico plant were received throughout March. To date a total of 650,000 gallons of seed material has been received. Seeding of Digester #2 was initiated and both it and Digester #3 are growing at a rate satisfactory to the Joint Venture. The readiness of the anaerobic system to receive and handle the full load of stillage during the Plant Acceptance test is a concern at this time.

The aerobic section of the Waste Water Treatment Plant was seeded in early March and growth of the seed material is proceeding at a pace complimentary to a late April acceptance test.

The Waste Water Treatment Plant centrifuge motors were returned to the vendor during March for rewinding and installation of a larger shaft to alleviate vibration problems. Changes were completed on two of the motors. They were returned to site, reinstalled and operated. Unfortunately the vibration problems persisted. At this writing tests are being made at the vendors shop to isolate the cause of the excess vibration.

Process Area startup activities are now well underway. During March wet alcohol, cycloexane, gasoline and necessary chemicals were received on site. Dryout of the biogas boiler was completed and it is now operating continuously on automatic controls. Once steam was generated by the biogas boiler it became possible to boilup the distillation unit and circulate wet alcohol. On 03/31/87 the first on specification product (200 proof)

was produced. The distillation unit continues to operate by recycling wet alcohol.

The first yeast cultures were grown in the seed fermenters and the prognosis for future success is bright. Present planning indicates that the first mash material will be placed in a main fermentation tank during the first week of April. Production of alcohol from this fermented mash could begin by mid-April.

The utility area is commissioned with the exception of the bagasse boiler system. The bagasse boiler refractory was dried out in late March and steam generation using bagasse as a fuel is expected in early April.

As previously mentioned in Section 2.0, the Joint Venture is scheduling the Plant Acceptance test to be completed by 04/30/87. The possibility of this being achieved continues to hinge on the rate of growth of the seed in the anaerobic digestors in the Waste Treatment Plant.

PROGRESS REPORT ON. 19
April 1987
HIBERNIA NATIONAL BANK
NEW ORLEANS, LA
BANK OF NEW ENGLAND
BOSTON, MA
AND
U.S. DEPARTMENT OF ENERGY
WASHINGTON, D.C.

CONSTRUCTION MONITORING
OF
AGRIFUELS REFINING CORPORATION
ETHANOL FACILITY
NEW IBERIA, LA

H-R INTERNATIONAL, INC.
PROJECT W.O. 951

PROGRESS REPORT NO. 19
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I	Summary of Progress
II	Scheduling
III	Startup
IV	Construction
V	Potential Problems
VI	H-R International, Inc. Activities
VII	Exhibits
VIII	Cost and Manhour Summaries (For Internal Use Only)

1.0 SUMMARY OF PROGRESS

1.1 GENERAL

This report covers H-R International's review and opinion, as construction monitor, relating to the progress obtained by Harbert International/Lummus Crest, Joint Venture, Southland Power Constructors and all subcontractors for the report period of April 1987.

ENGINEERING, PROCUREMENT AND CONSTRUCTION

Harbert/Lummus, Joint Venture progress for this month covering engineering, procurement and construction activities, was more than the disbursement schedule.

The overall cumulative progress for this project was reported by Harbert/Lummus, Joint Venture to be 98.81% complete, including change orders No. 2, 3, 4, 6, 7, 9 and 15. This was the same as the progress calculated by H-R International (See Exhibit No. 1E).

The overall progress obtained this month was 0.40%. The contractual payment schedule called for a monthly progress of 2.00%. At this time, the difference between the cumulative actual progress obtained and the Milestone and Disbursement Schedule through this month is 1.81% more than called for, not including approved change orders.

Startup progress increased to 87.26% during April.

2.0 SCHEDULING

Overall project construction neared 100% completion with landscaping and the Administration Building making up the bulk of the remaining work. Construction activity has ceased and all construction equipment and manpower has demobilized by 04/18/87. All EPC contract work for this project has been suspended due to nonpayment to the Joint Venture by Agrifuels Refining Corporation.

The Joint Venture executed the Certificate of Mechanical Completion on 04/10/87. It is the opinion of the Construction Monitor that Mechanical Completion had been achieved and the Certificate of Mechanical Completion was signed and returned to the Joint Venture on 04/15/87.

Startup activities were well under way in both the Waste Water Treatment and Process Plant but the status of each has regressed substantially since suspension of work.

It is the opinion of the Construction Monitor that Plant Acceptance will not be achieved prior to June 30, 1987. Under present circumstances any projection of Plant Acceptance is impossible until a course of action has been determined.

[p. 51] state that this is on behalf of the joint venture.

It goes on to say that they will provide the services for a price of $67.5 million and outlines services and terms of payment and other items.

Q So, what, if anything, did you do with this proposal?

A This proposal, to the best of my knowledge, was submitted to the Department of Energy in December of 1984 along with some supporting documents for our financing and guarantee of equity.

THE COURT: Was Harbert/Lummus, in effect, bidding on blueprints? What did it have in front of it?

THE WITNESS: No, it had outline specifications, as we call it in the trade. Detailed specifications as to what we wanted to produce. It had knowledge of the facility. It had their own knowledge of a similar project that they were doing at Ten-al.

It did not have what we call plot land drawings at that time at all. It was this type of facility, in terms of outlying specifications, in terms of operations building, control building. We need certain storage tanks, we need certain wastewater treatment facilities.

Of course, their intimate knowledge of what it takes to support that, such as roads and utilities and things all factored into their ability to provide an overall [p. 52] price.

THE COURT: Was the site already prepared?

THE WITNESS: The site was a grade deal site. It as a cane field site.

THE COURT: The amount that you said that DOE had at least initially guaranteed, did that have a dollar limit on it?

THE WITNESS: To my knowledge, they were going to guarantee 90 percent of whatever price we came up with, but we had to justify that price in terms of did it make money on an ongoing basis in order that we could continue to pay off a project?

THE COURT: Okay, go ahead.

BY MR. ALLEN:

Q Were there further negotiations on the contract?

A Yes, there were. Discussions took place in the first and second quarter of 1985.

Q Would you look in your booklet there at Plaintiffs' Exhibit 66?

A Sixty-six?

Q Yes.

A Okay.

Q Can you identify Exhibit 66?

A Sixty-six is a letter from Agrifuels signed by me, addressed to Steven Michelsen, the contracting officer for

* * *

[p. 137] THE COURT: All right. I think I understand. Go ahead.

(The document referred to was marked for identification as Plaintiffs' Exhibit 53.)

BY MR. ALLEN:

Q Would you turn to Plaintiff's Exhibit 53?

A Plaintiffs?

Q Plaintiffs' Exhibit 53, yes, sir. Can you identify that?

A This is a letter from me to Ed Alper and it's referencing back this $500,000. It talks about eligible and inelegible allowances.

Q Look at your next to last paragraph.

A It says, "My understanding that DOE is considering amending." Yes, I had been talking with Steve Michelsen about amending that, and they told me they were ready to proceed. Give me the formal documents that I need.

Q Let me point out that on the CC here, the name Thomas Keefe appears.

A Yes.

Q Who was Mr. Keefe?

A Mr. Keefe replaced Steve Michelsen, the original contracting officer, when we started the project, somewhere in this time frame in October, 1986. Michelsen was

* * *

[p. 163] scheduled?

A To the best of my recollection, it did not take place on February 5 nor did it take place in Washington, D.C. This meeting was shifted to New Orleans and took place in February, probably a week or so after this February 5 scheduled meeting.

Q Look on the second page under agenda?

A Yes.

Q Is item four, does it have anything to do with this schedule that we've been talking about?

A Yes, item four was specifically to discuss the status of the request or the milestone disbursement provision for the 18 month and also for a request for start up materials and a reallocation of savings in construction interest to contingency.

Q Do you recall anything about the discussion of the 18 month schedule at this meeting?

A To the best of my recollection, yes, we discussed this. At this time, which was February, the ultimate parent company, Triad America, was in open bankruptcy.

Q The parent company of who?

A Our parent was Edgington, and its parent was Triad America. Triad America had filed for Chapter 11 bankruptcy and that was public knowledge. The bankers knew it, the Department of Energy knew it, and the effect on that

* * *

[p. 187] A Best of my recollection, there was.

Q Then, meetings in April?

A April, we went and spent like three days there, Tuesday, Wednesday and Thursday in Washington, D.C., which was kind of a hammered out, hey, wait a minute, we're already into April now and you still haven't paid me.

The contractor was saying, look, I cannot continue this. My only leverage is to pull the plug and stop. You don't want to stop. We're saying, hey, the plant's ready to run. We've got a market out there. Let's work this together, saying the same thing.

(The documents referred to were marked for identification as Plaintiffs' Exhibit 93 and Defendant's Exhibit 29.)

BY MR. ALLEN:

Q Let me show you Plaintiffs' Exhibit 93 and Defendant's Exhibit 29.

THE COURT: I'm sorry, Plaintiffs' what?

MR. ALLEN: Ninety-three.

THE WITNESS: Okay.

BY MR. ALLEN:

Q Did you receive this letter from Mr. Wohadlo that's marked Plaintiffs' Exhibit 93?

A Yes, I did.

* * *

[p. 192] didn't have resources.

We met as a group, the bank, the contractor, Agrifuels and the DOE, and we talked for an hour plus.

Q Was it a positive meeting?

A The tone of the meeting was very positive, yes. We talked and several things were kicked around, and at that point, Mr. Beckman exited the meeting to go talk to someone. I don't know whom specifically, but he did come back say 20, 30 minutes later and stated that he wanted to talk with each of the groups individually.

To the best of my recollection, he talked with the bank group first, then Agrifuels and the contractor. He told us each privately somewhat the same things, I think, that hey, the Department of Energy is not going to provide any further funding as of this moment, even though we've put so much into it. At this time, we're just cutting it off.

Q That was it?

A That was it.

THE COURT: When you say funding?

THE WITNESS: Oh, guarantee of funding, excuse me, sir. Guarantee of funding.

(The document referred to was marked for identification as Plaintiffs' Exhibit 106.)

* * *

[p. 293] A My recollection is that Agrifuels got approval on some change orders. I can't remember how many.

Q Do you remember whether those change orders had anything to do with the acceleration?

A Well, my recollection is that one of the change orders they got approved had to do with monies they needed to support an earlier start up.

Q Which would be?

A It was consistent with the 18 month schedule that we were operating under.

Q All right. Now, my question is going back to the question of when you learned of some - let's put it this way. Did there come a time when you learned that there might be some problem with this change order?

MR. MELNICK: Objection. Leading.

THE COURT: Go ahead.

THE WITNESS: In the fall of that year, October through December, I was talking to Pat. I had a conversation or two I guess with either Tom Keefe or Erdman.

BY MR. ALLEN:

Q Had Keefe taken over as contracting officer from Michelsen?

A Yes. I can't remember when Steve left and Keefe came in.

Q Okay.

* * *

[p. 300] A Yes, sir, I did.

Q Where was it?

A It was at law offices in Washington. By that time, the contracting group, the joint venture, was really, really upset that we had been operating on an 18 month schedule from day one, that the plant was rapidly getting finished and that not only weren't we getting paid for that progress, but payments on the base contract progress were not being made.

I think I might have had a conversation between this meeting with Michael Cohen where Michael indicated that in this restructuring they were going to suggest to the contracting group that they come up with some money that would have otherwise been come up with from Edgington or Triad or whoever was going to come up with the money.

I told Mike that the first topic I was going to discuss at that meeting was the change orders, when we were going to get paid and what's going on.

When that meeting occurred, even before Edgington began to lay out their proposed restructuring I wanted to try to force the issue of the 18 month schedule change and the concerns we had about our payments continuing to be missed.

THE COURT: Who was present for the Government?

THE WITNESS: At that meeting, as I remember, Dan

* * *

[p. 302] million or $14 million short in the total of all of that. I wanted to try to reach a resolution.

Q Did the DOE make any response about the matter of approving the 18 month change order?

A The DOE's position at that meeting was that early completion would take care of all of our concerns, and all we had to do was complete it early.

They were there. They were committed to getting this project done. We were close, so what was the point at that point to deal with the 18 month schedule as an item that would inhibit us from participating in this restructuring.

Q Who said they were committed to completing the project?

A Dan Beckman said it. Keefe had said it to me on other occasions on the phone. I don't remember whether Tom said it ~~at~~ that meeting.

Q Do you remember Michael Cohen, Agrifuels' lawyer, making any statement at this meeting about the matter?

A I do. Michael Cohen had been pretty much out of this transaction, at least as far as our seeing him, from the closing.

When I spoke with Mike before this meeting, I told him, you know, we had been building this plant to finish

it in 18 months, and they still haven't changed the schedule.

* * *

[p. 314] MR. ALLEN: We offer Plaintiffs' Exhibit 93. It may be in.

THE COURT: I think it is.

BY MR. ALLEN:

Q Was there a meeting scheduled that this letter had anything to do with?

A Yes.

Q There was a meeting after this?

A Yes. Two things happened after this. We got a letter from Pat Hamilton I think very quickly after we sent this letter. I think it was maybe the next day –

MR. ALLEN: I think that is in evidence, Your Honor.

THE WITNESS: – in which Agrifuels said there are certain of your requirements we can respond to and accept, and there are certain that we cannot.

I remember looking at Pat's letter and calling up Pat and saying I think we're beginning to approach each other. We should really get everybody together to try to get this resolved in one room over a block of time. That resulted in a meeting. That resulted in meetings like maybe even starting on the 8th or the 9th, something like that, in Washington in the DOE's offices in the Forestall Building.

I was going to go over who was there. Should I continue?

* * *

[p. 316] that I thought this was the most positive meeting that the group of us had in quite a long time, and I thought it was going to get done while we were there.

Q What, if anything, happened?

A It was I think maybe in the afternoon of that day – I'm not exactly sure of the time – when somebody came into the meeting and either asked Dan Beckman or Tom Keefe to leave the room. It was one of the other of them. I cannot remember which.

We just continued on. The negotiations continued on, and then either Dan or Tom, whoever had left the room, came back and told the group there that they had been informed that the Secretary of Energy had decided to withdraw any further loan guarantees for this project and sat down. That's what happened.

Q What was the mood of the people who were told that?

A Pat Hamilton looked like somebody had just bludgeoned him with an ax handle. I mean, he just went white. The banks looked shocked.

We sat there, and we asked the question of what about our getting paid for the work we had done? What does this mean? What's going to happen? The answers that we got were we don't know any more than we have told you.

The meeting literally just kind of oozed out under

* * *

[p. 319] BY MR. ALLEN:

Q Mr. Wohadlo, I want you to look at Plaintiffs' Exhibits 102 and 103. Can you tell us what those are?

A Looking at Exhibit 102 –

Q It is more than one document.

A Yes, it is. Let's see. Exhibit 102 includes the joint venture's application for Payment No. 17, which I think that was for progress in January, and then it includes – let's see – the application for payment No. 18, which was for progress in February. That is No. 18. It includes No. 19 for progress in March, and it includes No. 20 for progress through April 15, 1987.

The April 15 date is when I believe Agrifuels shut the project down or concluded the shut down of the project. That is my recollection. That's what these are.

MR. ALLEN: We offer Exhibit 102, Your Honor.

MR. MELNICK: No objection.

THE COURT: It is admitted.

(The document referred to, having been previously marked for identification as Plaintiffs' Exhibit No. 102, was received in evidence.)

THE COURT: Which ones of these were actually paid?

[p. 320] THE WITNESS: Your Honor, I believe we were paid for No. 17.

BY MR. ALLEN:

Q This is our application for Payment 17, which goes into Borrowing Request 18?

A Yes. We were paid for a portion of our request on No. 17.

We were measuring our total progress, sir, in these requests for payments. That total progress was against an 18 month schedule, which we were operating at. We submitted a bill for the full amount.

We did not get paid this $7.5 million on No. 17. We got paid for a lesser amount. The amount we got paid – I don't remember exactly what it was – was the amount that the monitor was allowed to approve.

Q Look at Page 3. Page 3, Paragraph 6, shows the request. Does Paragraph 7 show the total cumulative construction?

A Which one are we looking at now?

Q I am looking at Page 3 of the February 18 monitor's certificates.

A Sorry, Ed. I am looking at the application for payment. Are you on Exhibit 103?

Q Yes.

A I'm sorry. I apologize, I'm on the wrong one.

* * *

POWERS - DIRECT

[p. 354] A What I remember is this was a meeting that took place in Donovan Leisure's office in Washington, D.C. I call it the fire escape meeting because before the meeting concluded some fire alarms rang, and I think Mike Cohen went out to find out what was happening and came back and said they weren't sure whether the building was on fire or not, but it could be. If so, we better leave. It sticks in my mind pretty well of that having occurred.

Q Prior to the fire alarms -

A Prior to that, it was a very heated discussion between Len and representatives of the Department of Energy as to why the change order for the 18 month pay schedule had not been completed.

I remember that they could not give us an answer why it had not been signed and why it had not been completed, but they repeatedly told us not to worry about that change order, to keep building the project and that we would continue to be paid.

Q Look at the first page of your notes, Plaintiffs' Exhibit 50.

A All right.

Q Do you see the notation of Mike Cohen?

A Yes.

Q Under that, can you read that to yourself and then tell us what, if anything, Mr. Cohen said in this meeting?

* * *

[p. 360] THE WITNESS: There was a very heated discussion between Len and Tom Keefe about why haven't you approved the change order because we're putting our money out now, and we're not being paid.

The response over and over from Keefe was don't worry about that, Len. Forget about the 18 month change order. We're going to fund this project to conclusion. You're going to get paid. Don't worry about. I don't want to hear any more about the 18 months. We're going to keep funding this.

THE COURT: Do you –

THE WITNESS: You have to understand, it was very heated on Len's part.

THE COURT: If you do not recall, do not try to speculate, but do you remember whether or not at that point there had been a technical default by the owner?

THE WITNESS: Yes, there had.

THE COURT: I believe the record is going to reflect what the stage of completion was, but what was on-going at New Iberia, and was new money being put in or not by the joint venture on February 24 and thereafter?

THE WITNESS: You say new money?

THE COURT: Were they continuing to work?

THE WITNESS: Oh, yes. Yes. We were within 30 days of starting up the plant. We had hired men who would [p. 361] be the operators of the plant because that was also the joint venture's responsibility under separate

contract. Those men had been hired. Those men had been trained. The molasses had been purchased, even though we weren't supposed to purchase it. We had to purchase the molasses.

THE COURT: When?

THE WITNESS: What?

THE COURT: When was that bought?

THE WITNESS: The molasses was bought, the majority of it, back in the fall.

THE COURT: What about the bacteria or whatever else you had to get?

THE WITNESS: Oh, boy. The bacteria I think had been bought in the late fall because it had to be shipped up from Puerto Rico. It had to have time to get it accustomed to living in Louisiana and to begin to grow.

As a matter of fact, we had to buy some sewage to put in there to keep them alive and to get the bacteria growing in the sewer plant so when we turned on the plant and put the effluent into the sewer plant, the bugs would be there ready to eat and do their thing.

THE COURT: All right. What occurred after February 24 in terms of new effort by the joint venture, if anything?

THE WITNESS: I don't understand your term, new

* * *

[p. 367] objecting.

THE COURT: I am back to the February 24 meeting that you had with Mr. Keefe and others. Did the Plaintiffs' activities in connection with this EPC contract change in any way because of those conversations?

THE WITNESS: We continued to work on the 18 month schedule after that date.

THE COURT: What would you have done differently, if anything, if you had not gotten that statement?

THE WITNESS: When we had discussions among ourselves, we would have been much more concerned about the future of the project if we had not been told don't worry because we're going to continue to fund the project.

THE COURT: Go ahead.

BY MR. ALLEN:

Q Were you told that at the April 9 meeting?

A Say what?

Q Were you told that we are not going to continue to fund the project at the April 9 meeting?

A We were ultimately.

Q Okay.

A We were not at the first part of the meeting.

Q Well, when?

A The meeting was I would call it in two parts because this was a meeting to continue talking about

* * *

[p. 372] (The document referred to, having previously been marked for identification as Plaintiffs' Exhibit No. 120, was withdrawn.)

BY MR. ALLEN:

Q Mr. Powers, are you still taking the position there was a meeting on April 9?

A Yes. I know there was a meeting on April 9.

Q And you went to it?

A Yes. I did.

Q Is that when you were told what the Department's position was from that point on?

A That is correct. That was the first time.

THE COURT: Before the second piece of that meeting, what was the stage of development of the restructuring at that point?

THE WITNESS: We were negotiating who would – I believe the joint venture had agreed to guarantee Note C of the bank, guarantee any further payments by the bank under Note C.

THE COURT: And were there any other outstanding issues in connection with the restructuring?

THE WITNESS: There was a source of start up funds.

* * *

BRABHAM - DIRECT

[p. 412] I am not trying to give you a date. We know what the date was. I am just asking you if you recall when you heard of it.

A I'm not sure. I think it was in March of 1987.

Q Actually, it was a meeting on April 9, 1987, but did there come a time when you heard that the support had been withdrawn?

A Yes.

Q At that time, what was the status of the construction on the project?

A The project was mechanically complete. It had been – the start up portion of the schedule was underway. There was some alcohol being made and put into tanks as a result of that start up activity, and there was a very detailed schedule leading up to acceptance of the plant and turning it over to the operations people.

As a matter of fact, at that time the majority of the plant was already in the hands of the operational people, and the various systems had been tagged out for their use only. Most construction people were not being allowed in those parts of the plant.

Activities that were going on in construction were punchlist type items, corrections of things that had been found or that just supported start up.

Q Was the acceptance test scheduled?

* * *

[p. 416] facilities in effect in one?

THE WITNESS: Yes. The production plant fed its waste to the other plant, which processed it.

THE COURT: I see.

THE WITNESS: I had a different responsibility for the production plant than for the waste plant.

THE COURT: How recently had you been on site in New Iberia as of April 9?

THE WITNESS: I'm sure it was less than 30 days.

THE COURT: And what sort of reports were you getting?

THE WITNESS: Every day telephone conversations with the superintendent of construction and with the manager of operations.

THE COURT: Were you or are you familiar with what is involved in the acceptance testing?

THE WITNESS: Yes.

THE COURT: All right. Go ahead and answer the question.

THE WITNESS: As I was about to say, based on what I had seen with the alcohol plant at Ten-Al and

comparing that to the start up activities at Agrifuels and based on my knowledge of the systems and their testing by systems, I had every reason to believe that that schedule would be met certainly within a few days or hours. It wasn't months or [p. 417] weeks. The question was hours or days.

BY MR. ALLEN:

Q What about the question specifically of April 23 starting the seven day performance test with acceptance of April 30?

A Well, the provisions for the testing allowed for stopping and having time that did not count. If you're asking me whether that would be a continuous seven days, I don't know. That wasn't necessary. The documents address that very clearly about what was acceptable in terms of time that would not count in the test.

Within the framework of the test specifications, I don't see why the plant would not have met the expectations. Whether it was exactly seven days or not is not particularly relevant as long as it met the requirements of the specification.

Q Were you familiar with the requirements at the time?

A Yes, I was.

Q In your view, was it ready for or was it in shape to meet acceptance by the 30th of April?

A In my view it was, yes.

Q Describe for the Court some of the steps that the contractor had gone through to get this plant completed early.

* * *

NEWMAN – DIRECT

[p. 507] am not mistaken.

MR. MELNICK: Let me check that real quick.

THE WITNESS: Under Tab 40, I am looking at a document that is headed, Department of Energy Delegation Order No. –

THE COURT: One moment, please, sir.

MR. BLANTON: I am sorry, it is our number 72.

BY MR. MELNICK:

Q Sir, if you look at the Plaintiff's exhibit book just to maintain consistency here, there are two other ones sitting there. I think they are marked Plaintiff's exhibits.

A Yes.

Q You are looking for Plaintiff's Exhibit 72. (Pause.)

A Under Plaintiff's Exhibit 72, the first page I see is the Department of Energy Delegation Order No. 0204-98, Assistant Secretary of Management and Administration.

Q That is what I am looking for you to look at.

First of all, can you identify what this document is?

A This is a delegation of authority from Secretary of Energy Edwards to the Assistant Secretary of Management Administration.

Q Was the Assistant Secretary of Management and

* * *

[p. 510] BY MR. MELNICK:

Q If you look at paragraph 1.

A Yes, sir.

Q If you could read that to yourself, and then I will ask you a question about it.

(Pause.)

A Yes, sir, I've read it.

Q Is this a redelegation of the delegation that you just referred to from previous documents?

A Yes, sir. What Bill Heffelfinger had done here, he has redelegated his authority to my boss, the Procurement Executive, Senior Procurement Official, Director of Procurement and Assistance Management, the Senior Procurement Official. So Bill Heffelfinger redelegated his authority to my boss.

Q The Director of Procurement Assistance Management was your boss?

A Yes, sir.

Q It should be Plaintiff's Exhibit No. 74. I am sorry, Plaintiff's Exhibit 76. Let us look at Plaintiff's Exhibit 77 first.

A I am looking at the document dated December 8, I guess. December 9th, I guess, it's kind of blurry here, 1982. It's a memo –

Q Well, let me stop it. Is it entitled, Delegation [p. 511] of Authority With Respect to Loan Guarantee Agreement, Alcohol Fuels Energy Projects?

A Yes, sir, it is.

Q Okay. You are looking at the right document. And below the part that I just read, it says to Director, Office of Procurement Operations, right?

A Yes.

Q Can you identify what this document is?

A This is a document signed by my then boss, Hilary Rauch and also signed by the Acting Director of the Alcohol Fuels office, Mr. Tribble. This is a general delegation of authority to me.

Q To you?

A Yes.

Q With respect to what?

A It is a delegation of authority that relates to – the first paragraph says, its delegation in the following authority with respect to awarded loan guarantee agreements between the United States of America and applicant selected for award under title of um-di-di-dum. So therefore, if –

Q Let me stop you. Do not say um-di-di-dum.

A I am sorry.

Q I believe from what you are reading, it said the Energy Security Act?

A Yes, sir, it did. I'm sorry.

* * *

[p. 524] Refining Corporation?

A Yes, sir.

Q Dated September 25, 1985?

A Yes, sir.

Q What is this document?

A This is my delegation of authority to Steve Michaelson. By this time, Steve Michaelson is the Director of the Alcohol – by this time, Steve Michaelson is the Director of the Financial and Cities Operations Division. So I'm basically in this document giving Steve Michaelson the authority so I'm approving the deal. In this document I approve the award closing of the Agri-fuels deal.

I am also delegating authority to sign the deal. So he is – so I'm approving the deal and I'm giving him authority to sign the deal.

Q Would he have authority to sign the deal without your approval?

A No, sir, he would not. As I mentioned, contracting officers are controlled through approvals. They all had certain limitations on what they can approval. Because of this being over $50 million, I had to get approval for the deal. When the delegation came to me, it said only I can approve it. I can't redelegate that. So in

this document, I'm approving the transaction. I'm then also authorizing him to sign to close on this. That means that

* * *

[p. 528] BY MR. MELNICK:

Q Page 2 has another set of paragraphs 1 and 2.

A Yes, sir.

Q The second one says, "This delegation of authority, in addition for purposes of agreement and administration covers only those actions with potential liabilities valued up to, and including, but not exceeding $25,000,000."

Can you explain what that means?

MR. BLANTON: No. I object to that, Judge. I think it speaks for itself.

THE COURT: I was reading it. Tell me what the question was again.

MR. MELNICK: I read the sentence, and I asked him to explain what it means.

THE COURT: No. Explanation is not relevant. I mean if he wants me to some understanding that he has based on some regulation or some other public documents that fill out the meaning of those words, that is fine. But just his own private understanding would not have any legal significance.

MR. MELNICK: He was the Director at the time, Your Honor, and as the Director he has responsibilities to the public. Therefore, one would seem that his

interpretation would be of significance from the standpoint

* * *

[p. 530] and answer would be relevant.

MR. MELNICK: All right. Thank you.

BY MR. MELNICK:

Q Actually, let me ask you this then. When Mr. Michaelson left, you said he was replaced by Mr. Keefe?

A Yes, sir, that's correct.

Q Did you provide a delegation of authority to Mr. Keefe?

A Yes, I did. When Tom Keefe took over the Financial Incentive Operations Division, at that point in time, as I recall, we had dealt with all of the conditional commitments. So the only thing left in the shop was the three loan guarantee deals. That was the New Energy Company that had a deal. There was the Ten-Al deal and there was the Agrifuels deals. All the other conditional commitments had been disposed of in one way or the other.

So I gave to Tom Keefe a general delegation of authority which would attempt a post-administration because that is all the deal that remains. And I gave him a $50 million delegation of authority as contrasted with this $25 million that I'm looking at here on the second page of People's Exhibit 74.

Q Let me ask you to turn to Defendant's Exhibit 92.

MR. ALLEN: What is your exhibit number?

* * *

[p. 626] serious problem.

Q You described the purposes of the, I think it is the April 9 meeting that I am referring to, the Department of Energy. Do you have a recollection of some sort of interruption in the meeting that took you out of it, anything along those lines?

A There was a planned interruption.

Q I am sorry. Okay. Go on.

A Previous to the meeting in the morning about 10:00, we also had a meeting about 9:00 in the Secretary's conference room with the Under Secretary.

Q Who was that?

A Joseph Salgado.

Q Okay, go on.

A With my boss, which was Donna Fitzpatrick.

Q Mr. Lindahl.

A Excuse me. Mr. Lindahl, who probably was my boss at the time, Donna Fitzpatrick who was one of the people that sat in on these kinds of boarded [sic] Directors' meetings. This would be like Harbert going to their Board of Directors and discussing things.

Q Are you a little uncertain about Mr. Lindahl being there?

A Yes. I don't know that he was there or not. And the group that was involved, I would assume that Tom

Keefe, [p. 627] myself, other staffers, generally meetings at that floor were limited to principals and a minimum amount of staffers. A discussion with Mr. Salgado about the status of the progress, about how the administrative management team or the loan servicing team, whatever you want to call it, our group of people that tried to monitor these projects.

How we were going and under what philosophical basis? What I mean by that, the continuation of a workout mode. Whether we should be going forward with that, whether instructions from our senior management at the time. And for some time, none of us felt that we had the authority to deal with what was becoming a very serious situation. So we always sought additional discussions above to get the feeling of upper management.

I was told at that meeting after our presentation by Mr. Salgado that he would be talking with the Secretary within a fairly short period of time. Since our meeting was coming up, I believe at 10:00 with the project participants, at a certain time, I was suppose [sic] to come up and find out whether or not he indeed had talked with Secretary Harrington.

Q All right.

A We started the meeting, the discussions were amicable. We were still talking about workouts. We were still talking about proposals. I left the meeting – I [p. 628] didn't have one of those watches that goes off, but I was able to at least decide when I could leave. I left and went upstairs and went into Mr. Salgado's office. He told me that he had spoken with Mr. Harrington. Mr. Harrington had decided that enough was enough, and that he was

not going to approve further disbursements under the guarantee provisions of the project.

Q Did you find out why that was the case?

A I – my understanding from Mr. Salgado was that – in his – giving all the information to Mr. Harrington, Mr. Harrington decided, speaking for the department, was no longer satisfied, that the project was economically feasible.

Q Anything else?

A That I was suppose [sic] to go down and tell the parties.

Q Did you do that?

A Yes, I did.

Q Do you have any recollection of the response from the parties?

A I went down, on the way down, I picked up Larry Oliver who was one of the senior attorneys and asked him how we should proceed. He basically, I think went in and pulled out our people so that I can tell them what the Secretary said from Mr. Salgado, independently, which I did. We then [p. 629] decided, I think, the next group, I believe, would have been the banks which would have been our guarantor or partner. We advised them what we had heard. We then, I think, spoke with the borrower.

Q Individually, together?

A I believe we called each party separately. I think we probably said, everybody leave, and you stay here DOE. Then, go out in the hall and bring in the banks. You

come in and then go out in the hall. The banks leave and Agrifuels comes in. Then, Agrifuels leaves and we call the joint venture. I believe we told the joint venture at last.

Q Do you recall what the percentage of completion was of the plant at this point in time?

A I think the plant was pretty close to being mechanically complete, it [sic] not already mechanically complete. I do not believe it was yet ready to go into a start-up and be certified as a completed plant meeting all of its production guarantees. But that was something that certainly would have been occurring within the next several weeks assuming they would have been complete, we were pretty close to having a complete plant. According to my experience, you are never guaranteed that you are going to have a complete plant until you actually pass the test. There was nobody we had dealt with that ever passed the test right away.

* * *

[p. 639] borrower or you would have arrangement – these are all different proposals. The JV doing a sale leaseback arrangement. Bringing another party in with deeper pockets, a corporation.

Were there other companies already in the ethanol industry who would be interested in coming in and acquiring the plant, finishing it and operating it, and taking on the debt of the Department and paying that back? I believe that ADM was asked if they wanted to get involved. It would have made some sense, they didn't have a presence in that part of the country. But I believe

they turned it down. They liked to build their own plants with their own people. So they didn't want to acquire someone else's private – but eventually, none of those workouts worked out.

It became necessary during that time to protect the safety of the plant, to protect the assets that were still in existence, and we had a requirement of the borrower that they, under the agreements, had to keep the collateral secure, and the borrowers instructed to take its best efforts to make the collateral secure, and work with the servicing bank to do so.

So yes, we were in a caretaker mode, eventually, it was decided to put the plant in what we call a cold shutdown which was that it would be shutdown, protected from as much deterioration as we could, nitrogen blanketing,

* * *

BECKMAN – CROSS

[p. 685] characterization of what Mr. Keefe thought.

MR. BLANTON: Well, let us look at Exhibit 28 then.

MR. MELNICK: Exhibit 28 speaks for itself.

THE COURT: Maybe Mr. Keefe expressed his views in some other fashion. You met with him that day, is that right?

THE WITNESS: We met with Mr. Salgado that morning before the meeting.

THE COURT: I think we have already gone through once, have we not, or are we on a different –

MR. BLANTON: We were talking about the 18-month schedule before, now we are talking about completing the plant.

THE COURT: All right.

BY MR. BLANTON:

Q Did Mr. Keefe say in the meeting with Mr. Salgado, or at least indicate to you that he had been proceeding on the understanding that you were going to complete the plant?

A This says that the Under Secretary asked for the status. It also then says, that we were proceeding on the understanding that the Secretary had decided to continue. So we were – that was our instructions at the time in our discussions with them that we were going to continue and try to work this out. To the end, again, it would be more [p. 686] valuable for the Department if that plant could be brought up to operating and produce ethanol from a programmatic point of view and for the value of the plant point of view.

Q My question is, both you and Mr. Keefe had that understanding?

A That was our understanding at the time.

Q In fact, and as late as this meeting, the Office of Procurement had projected the cost of shutting down the project to be more than the cost of completing the plant, had it not?

A We looked at all kinds of scenarios in terms of costs to shut it down, costs to do a number of different things.

Q Do you remember that the result of all the analysis had been that it was going to cost more to shut it down than it is to finish it?

A Assuming the plant could be finished, the way it was set up in the documents and they couldn't be operated, and that cost of money could be expended, yes.

Q In fact, even if you had to sell it for half of what it cost to build it, it still made sense to complete the plant, did it not?

A Hindsight says that [sic] true.

Q At the time, you all had –

A Well, if you assume that we are going to take the

* * *

CROYLE – DIRECT

[p. 765] obligated to do during that period. And it contained cure rights and things of that sort.

The difference between this credit agreement – these credit agreements and others, more typical commercial bank credit agreements, would be that there often would be reference to other project documents and maintaining of those other project documents to maintain the integrity

of the project and the economics of the project and that single repayment source.

In this transaction, we – we had a Government guarantee of 90 – a U.S. Government guarantee of 90 percent of the – of the loan – loans that went out, plus we had a guarantee for an additional five percent that was covered by letter of credit and the banks were then exposed for five percent with – without any – any guarantees. The guarantee agreement that we are often referring to is that agreement with the Government that laid out the terms of the – of the – of the guarantee and – and payment under the guarantee and – and sort of linking the guarantee to the credit agreement in the way funds were disbursed and things of that sort.

Q And was there a document called the servicing agreement?

A There was and –

Q And what is the servicing agreement?

* * *

[p. 769] typically, the bonus and penalties are tied to that.

The contractor, I think, was – felt that he could build the plant sooner than the 21-month schedule and there was some discussion about whether there would be a change from a 21-month schedule to an 18-month schedule on that Milestone Disbursement Schedule.

THE COURT: Are we talking about a discussion in that main conference with all the parties, or a side-bar, or what?

THE WITNESS: Sir, I think that those discussions were sort of part of the – the ongoing development of the transaction throughout this time. I don't remember a specific discussion in the room about, you know, at a particular time. But, generally, through this period, there was – there was discussion I was aware of going on about changing from a 21-month to an 18-month schedule.

BY MR. FINGERET:

Q Were you involved in any of those discussions yourself?

A I would not have been a principal. I would have been kept informed. I would have – I knew about it. The – I'm sure that I would have been asked my position on it, on whether the banks would approve it to an 18-month schedule, and I'm sure we did indicate that. I know we did indicate that if – if a change were made to an 18-month [p. 770] schedule, that the – and the guarantee agreement would apply so that any disbursements were – were covered by that guarantee that the banks would not have any objection.

Q Were you ever advised at the time of the closing that there was an agreement to change the Milestone and Disbursement Schedule from 21 months to 18 months?

A No. They did not reach agreement.

Q You were never advised of that?

A No, I was never advised they had reached agreement.

Q And when you say "they," who are you referring to?

A The – the borrower and the contractor.

Q And did you have dealings with Mr. Steve Michelsen during the closing period?

A Yes. Steve was the contracting officer for the DOE.

Q And did you have discussions with him during that course?

A Frequent discussions.

Q Did Mr. Michelsen ever advise you that there was a change, or that he had approved a change, in the Milestone and Disbursement Schedule from 21 months to 18 months?

A No, to the contrary. He – I was aware that they decided – that the decision was not to go to the 18-month schedule.

* * *

APPENDIX E

In the United States Court of Federal Claims

No. 93-207C
(Filed: December 19, 1996)

****

HARBERT/LUMMUS, et al.

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

****

ORDER

On August 30, 1996, the court ruled that the Government promised plaintiff directly that it would not withdraw its obligation to guarantee, up to ninety percent, loan advances to pay for work plaintiff performed in completing a project being built for a third party. *Harbert/Lummus v. United States,* 36 Fed. Cl. 494 (1996). The court found that plaintiff had performed additional work in reliance on that promise and that the Government breached its promise by subsequently withdrawing further guarantees. The court held that the Government is liable for damages resulting from plaintiff's work performed after February 24, 1987, the date of the promise, but that was not yet authorized according to the payment schedule as of April 9, 1987, the date plaintiff knew the guarantee was withdrawn. Although evidence sufficient

for calculation of damages was adduced at trial, the court ruled on liability only. It asked the parties to attempt to agree on damages. They have been unable to do so and have briefed issues in connection with the proper amount of the judgment.

Three issues remain. The first concerns how the court should measure the damage plaintiff sustained during its period of reliance on the promise. This is made somewhat problematic by the fact that the starting and ending dates derived by the court do not coincide with any measurement periods called for under the contracts.

The parties agree that it is appropriate to utilize the monthly Construction Monitor Progress Report as a measure of the value of work performed. This leads them to agreement with respect to a figure for March. There are progress reports reflecting the total, end-of-month, contract dollars for work performed as of February 28, 1987 – $76,775,734 – and for March 31, 1987 – $78,549,279. The difference is $1,773,545. The parties agree that ninety percent of that amount, $1,596,190, is the correct amount.

With respect to February, the parties agree that a similar method, when converted to a daily rate, yields a figure of $94,869.32 per day. The court agrees with defendant that four, rather than five days are the correct number. Accordingly, ninety percent of the total for four days is $341,530.

With respect to April, the parties agree that the same method applies, but disagree as to whether work should be prorated on a daily basis to reflect only the first nine days of [sic] the entire month, because the guarantee was withdrawn at that point. The court agrees with plaintiff

that the entire amount earned that month should be utilized, for two reasons. First, there is testimony from William Powers and Bobby Brabham that no progress was achieved after the guarantee was withdrawn. Second, the court finds that it is not unreasonable for the plaintiff to have incurred what the Government characterizes as "shutdown activities" after April 9, 1987, and that those were for the Government's benefit, particularly because the Government later contracted with plaintiff to keep the plant from deteriorating. It would be virtually impossible to bring a construction project from an operational to nonoperational status overnight.

One additional issue remains with respect to April. The April 30, 1987, progress report shows total contract dollars for work performed to be $78,937,361. The comparable amount for March is $78,549,279. The difference is $388,082. Plaintiff contends that this figure understates the actual amount by approximately $500,000, based on the department's April 8, 1987 letter placing a total value on the contract of $80,385,460.[1] The difference apparently derives from including change order work in the latter figure. The court agrees with plaintiff, but only in part. To the extent change order work took place in the February-April time period and is not otherwise captured in the month-end figures, it should be included. The exhibits relied on by plaintiff do not demonstrate that all the

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[1] It is not clear to the court why the plaintiff uses "weighted dollar values" for the April calculation, while it apparently agreed with the defendant that the "cost in dollars" reflected in the progress reports would be used for February and March. The difference between "cost in dollars" for the two months yields approximately the same amount.

change order work took place in that time period, however. In fact, a comparison of the March and April progress reports show that only $90,089 of value was added between February and April for three change orders. Accordingly, the court will use $79,027,450 as the final contract value figure. The difference for April is thus $478,171. Ninety percent of that amount is $430,308.

Totalling the figures for the entire period during which plaintiff incurred damages in reliance on the Government's promise yields a figure, when discounted by the guarantee percentage, of $2,368,028.

A second issue concerns whether the plaintiff should be reimbursed for costs incurred in connection with starting up the facility. Plaintiff disbursed approximately $798,000 toward that end. The Government quarrels, not with inclusion of amounts for start up in general, but with paying for costs incurred prior to February 28. The court is satisfied that plaintiff's proof eliminates expenses incurred prior to that date. The court will therefore include ninety percent of $558,600, or $502,740.

The final issue concerns whether interest calculated pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1994) (CDA), attaches to plaintiff's recovery. The Government argues that it does not, because the contract the court has found is not subject to the CDA. It contends, moreover, that if it is, then the full panoply of rights and obligations of the Federal Acquisition Regulations (FAR) applies to the contractual relationship, including a need for the agreement to be in writing. The court notes initially that the Government's reliance on the FAR amounts to bootstrapping. To support the contention

that the FAR, which applies to acquisition contracts, governs the present oral contract, the Government cites 48 C.F.R. § 2.101. That section defines contracts as "all types of commitments that obligate the Government to an expenditure of appropriated funds, and that, except as otherwise authorized, are in writing." It is illogical to rely on that section both to bring the oral contract at issue within its sway and then simultaneously declare it invalid because it is oral. The FAR, in any event, do not purport to reach every set of facts by which the Government can be contractually bound to answer in damages. The court holds that the present circumstances do not constitute the type of formal acquisition that comes within the scope of the FAR.

That conclusion does not, however, result in a concomitant conclusion that the contract is not subject to the CDA. Within the CDA itself there is no direct connection to the FAR. A contract is not funneled into those regulations merely because it might otherwise be within the reach of the statute. The CDA, for example, reaches implied-in-fact contracts. It applies to "any express or implied contract . . . entered into by an executive agency for the . . . (2) procurement of services [or] . . . construction. . . . " 42 U.S.C. § 602(a). What the court has found in the present facts is an express oral contract entered into by an executive agency for the procurement of plaintiff's construction services. Although the Government was not, at least initially, the owner of the project, it received consideration from the plaintiff's continued investment of material and labor in a construction project in which the Government retained certain rights through its guarantees. The contract is thus subject to the CDA.

Plaintiff's claim was filed on February 4, 1993, and interest thus runs from that date.

CONCLUSION

The Clerk is directed to enter judgment for plaintiff in the amount of $2,870,768, together with interest from February 4, 1993, pursuant to 41 U.S.C. § 611. Costs to plaintiff.

/s/ Eric Bruggink
ERIC G. BRUGGINK
Judge

APPENDIX F

CODE OF FEDERAL REGULATIONS
TITLE 48 – FEDERAL ACQUISITION REGULATIONS SYSTEM
CHAPTER 9 – DEPARTMENT OF ENERGY
SUBCHAPTER A – GENERAL
PART 901 – FEDERAL ACQUISITION REGULATIONS SYSTEM
SUBPART 901.6 – CONTRACTING AUTHORITY AND RESPONSIBILITIES

901.602-3 Ratification of unauthorized commitments.

(b)(2) The Procurement Executive is authorized to ratify an unauthorized commitment.

(3) The ratification authority of the Procurement Executive in subparagraph (b)(2) of this section is delegated to the Head of the Contracting Activity (HCAs) for individual unauthorized commitments $25,000 or under. The ratification authority of the HCA is nondelegable.

(c) Limitations.

(7) Procedures. The following procedures shall be followed for ratification of any unauthorized commitment:

(i) Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitment, the Contracting Officer shall advise that person that the work is unauthorized and performance is at the person's own risk.

(ii) The Government representative who made the unauthorized commitment shall furnish the contracting officer, through the Director of the cognizant Program

Office at the contracting activity, or comparable official, all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to, a statement as to why authorized procurement procedures were not used, why the contractor was selected, a list of other sources considered, description of work to be performed or products to be furnished, estimated or agreed upon contract price, citation of appropriation available, a statement as to whether the contractor has commenced performance and status of work. To preclude recurrence, the Director of the Program Office will include in the package recommendations for corrective action. If the Government representative who made the unauthorized commitment is no longer available, appropriate program personnel shall provide the information described in this paragraph to the contracting officer, along with the name of the employee who made the commitment.

(iii) The contracting officer shall evaluate this information, make a determination with respect to reasonableness of price and recommend whether payment should be made (see FAR 1.602.3(c)), and forward the documentation to the HCA.

(iv) For individual unauthorized commitments $25,000 or less, local procedures may require legal counsel concurrence, but such concurrence is not a requirement of this subsection. The HCA is responsible for assuring the implementation and monitoring of a corrective action plan. A copy of each ratification action by an HCA, along with supporting documentation, shall be provided to the Director, Office of Clearance and Support, within the Headquarters procurement organization.

(v) For individual unauthorized commitments involving amounts in excess of $25,000, the HCA or designee will evaluate the information assembled pursuant to subsection 901.602-3(c)(7)(ii) above, including the corrective action plan, and, if the HCA concurs, forward the package with HCA concurrence to the Procurement Executive.

(vi) The Procurement Executive may ratify the unauthorized commitment after coordinating with the Office of General Counsel and, when deemed necessary, obtaining the concurrence of the Senior Program Official. The Procurement Executive or designee shall monitor the implementation of the corrective action plan.

(vii) If the Procurement Executive does not ratify the action, the file will be returned to the HCA with an explanation of the decision not to ratify.

(viii) If an unauthorized commitment is ratified, the supporting documentation will be included as part of the official contract file. If an unauthorized commitment is not ratified, the documentation will be maintained for audit purposes as a separate file by the cognizant contracting office.

[54 FR 27645, June 30, 1989; 59 FR 9103, Feb. 25, 1994]

Supreme Court, U.S.
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No. 98-697

In the Supreme Court of the United States

OCTOBER TERM, 1998

HARBERT/LUMMUS AGRIFUELS PROJECTS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reversed the trial court's judgment in favor of petitioners, based upon a breach of an oral contract by the United States, because no lawful contract existed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62-74) is reported at 142 F.3d 1429. The opinion of the United States Court of Federal Claims (Pet. App. 1-61) is reported at 36 Fed. Cl. 494.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1998. A petition for rehearing was denied on July 27, 1998 (Pet. App. 75). The petition for a writ of certiorari was filed on October 26, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, pursuant to the Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. 8801 *et seq.*, the United States Department of Energy (DOE) contracted with Agrifuels Refining Corp. (Agrifuels) and various lending banks for DOE to provide a 90% guarantee of the construction financing of an ethanol plant that would be owned by Agrifuels. Agrifuels separately contracted with petitioners for the latter to construct the plant. Pet. App. 3-5.

The construction payment schedule, which was included in both DOE's loan servicing agreement with Agrifuels and in Agrifuels' separate construction contract with petitioners, provided for disbursement of progress payments over 21 months. Pet. App. 6-7. When construction progressed more quickly than the 21-month disbursement schedule, petitioners requested a modification of the schedule to reflect their actual performance. Agrifuels forwarded to DOE different forms of the request, which was ultimately denied. *Id.* at 23-28, 35.

In January 1987, prior to completion of plant construction, Agrifuels' parent corporations declared Chapter 11 bankruptcy, which constituted a default under Agrifuels' guarantee agreement with DOE and the financing banks. Pet. App. 28-29. Instead of immediately exercising their default rights, DOE and the banks executed monthly waivers. *Id.* at 29. However, concerns arose about the viability of the project and a need to restructure financing. *Ibid.* At a meeting of the various parties held on February 24, 1987, the Vice President of Harbert International, Inc., stated that he wanted the requested disbursement modification approved. *Id.* at 29-30.

Daniel Beckman, DOE's Deputy Director of the Office of Alcohol Fuels, who did not have contracting authority, responded that DOE was committed to funding the project to completion, and if the contractor completed the project, all of the payments would work out. The trial court found that the DOE contracting officer, Thomas Keefe, was present when that statement was made and did not question it. Pet. App. 30-31. Although finding Keefe present, the trial court did not find that Keefe actually heard the Deputy Director's statement at the meeting. Keefe was deceased by the time of trial, and had not previously provided any testimony. *Id.* at 28.

The parties continued to meet to discuss possible new arrangements for financing in light of Agrifuels' default. Pet. App. 32-40. On April 9, 1987, during one of these meetings, DOE informed the parties that the Secretary of Energy would not proceed with the guarantees of any more disbursements because the project was not viable. *Id.* at 39-40. Subsequently, DOE formally declared Agrifuels in default and assumed control of the plant pursuant to its rights under the guarantee agreement. *Id.* at 42-43.

DOE eventually paid approximately $70 million in guarantees upon the previous disbursements. DOE ultimately sold the plant for scrap for approximately $3 million. Pet. App. 43.

2. Nearly six years later, in 1993, petitioners filed suit against the United States in the United States Court of Federal Claims, essentially asserting two claims.

First, petitioners claimed that in 1985, at the time of the closing of the various written contracts related to the project, negotiators for petitioners and DOE entered into a separate oral contract. Petitioners claimed

that DOE promised that if the joint venture performed its construction contract with Agrifuels on an accelerated schedule, DOE would approve an amendment to the payment schedule of the construction contract, allowing Agrifuels to disburse DOE-guaranteed funds to petitioners on that accelerated basis. Because DOE never approved such a modification of the payment schedule, at the time DOE withdrew its guarantee petitioners had been paid far less by Agrifuels for their performance of the construction contract than they would have been paid had DOE allowed accelerated payment. Pet. App. 44.

Second, petitioners alleged that, in February 1987, after Agrifuels defaulted under its guarantee agreement with DOE, Keefe orally promised petitioners that DOE would continue guaranteeing disbursement of funds for the project until completion, inducing petitioners to remain on the job longer than they would have otherwise. Pet. App. 44.

3. After a trial, the Court of Federal Claims rejected petitioners' claim that an oral contract was formed requiring DOE to approve an accelerated payment schedule. Pet. App. 44-49. However, the court found that at the February 24, 1987 meeting, Beckman made an oral offer to petitioners that DOE would continue to guarantee future funding of the project through completion, notwithstanding Agrifuels' default, if petitioners would not follow through on a threat to abandon the project. *Id.* at 30-31, 45-55.

The trial court found that this oral statement by Beckman constituted a formal offer to petitioners to enter into a unilateral contract with DOE, and that such a contract was formed when petitioners performed by remaining on the job. Pet. App. 49-55. The trial court did not find that Beckman possessed authority to bind

the government to this oral promise. *Id.* at 14 n.27, 55-57. Instead, it found that Keefe, who was present but remained silent when Beckman made the statement, possessed the authority to enter into such an oral contract with petitioners, and his silence amounted to a ratification of Beckman's statement.[1] *Id.* at 31, 49, 55-57. The trial court then held that in April 1987, when the Secretary of Energy decided that no new additional loan disbursements would be guaranteed by DOE, he in effect repudiated the oral contract, obligating the government to pay up to the amount of its guarantee for the additional work that petitioners had performed after February 24 in reliance upon the promise. *Id.* at 52, 55, 60.

In a subsequent decision dated December 19, 1996, the trial court elaborated upon the nature of the contract that it had found. Pet. App. 156. After ruling that the government was liable to petitioners for $2,870,768, the trial court emphasized that "[w]hat [it] has found in the present facts is an express oral contract entered into by an executive agency for the procurement of plaintiff's construction services." *Id.* at 160. The trial court therefore ruled that the pre-judgment interest provisions of the Contract Disputes Act (CDA), 41 U.S.C. 611, applied. Pet. App. 160. The court issued judgment for petitioners in the amount of $2,870,768, plus interest from February 4, 1993.

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[1] Petitioners imply that the trial court found that Keefe affirmatively stated his consent to the agreement by quoting the trial court's statement that Keefe had "acquiesced." Pet. 5. However, the trial court's findings do not include any affirmative act or statement by Keefe. Instead, the court based its conclusion that Keefe "acquiesced" on the mere fact that he was present and did not question Beckman's statement. Pet. App. 31, 49, 56 n.67.

4. The government appealed the trial court's judgment for petitioners that there was a unilateral contract obliging DOE to continue to guarantee disbursements until petitioners completed the project. Petitioners cross-appealed the trial court's rejection of their allegation that an earlier contract was also formed committing the government to approve any request for modification of the payment disbursement schedule.

5. The court of appeals reversed the trial court's judgment in favor of petitioners. Pet. App. 62. The court of appeals ruled that the trial court erred in holding that Keefe was authorized to bind DOE to the oral contract because Keefe's delegation of authority required that all actions taken by him be accompanied by a prior written approval.[2] *Id.* at 67-70. No evidence of such written approval was presented to the trial court. *Id.* at 68-69.

The court of appeals further held that even if Keefe had been delegated authority to bind DOE to an oral contract, he did not ratify such an oral contract in the

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[2] On November 15, 1986, Keefe was delegated "the authority, with respect to actions valued at $50 million or less, to approve, execute, enter into, modify, administer, closeout, terminate and take any other necessary and appropriate action (collectively, 'Actions') with respect to Financial Incentive awards." Pet. App. 68, 111-112. Citing DOE Order No. 5700.5 (Jan. 12, 1981), the delegation defines "Financial Incentives" as the authorized financial incentive programs of DOE, "including direct loans, loan guarantees, purchase agreements, price supports, guaranteed market agreements and any others which may evolve." The delegation proceeds to state, "[h]owever, a separate prior written approval of any such action must be given by or concurred in by Keefe to accompany the action." The delegation also states that its exercise "shall be governed by the rules and regulations of [DOE] and policies and procedures prescribed by the Secretary or his delegate(s)." Pet. App. 111-113.

circumstances presented here. There was no finding that Keefe actually heard Beckman make the offer that supposedly led to the unilateral oral contract. In the absence of a finding that the authorized official had knowledge of the unauthorized act, he could not be found to have ratified it. The mere finding by the trial court that Keefe was present when Beckman made the oral offer is not a finding that Keefe heard the offer. Pet. App. 70-71. The court of appeals also held that ratification requires a demonstrated acceptance of the contract, and mere silence is not a demonstrated acceptance. *Id.* at 71-72. Finally, the court of appeals noted that the same delegation of authority requiring Keefe to memorialize his actions in writing required that any ratification by him be memorialized in writing, and no such memorialization existed. *Id.* at 72.

In an aspect of its decision not challenged before this Court, the court of appeals rejected petitioners' cross appeal of the trial court's holding that there was no earlier contract binding DOE to approve a requested modification of the disbursement schedule. Pet. App. 72-73.

ARGUMENT

The decision of the court of appeals is correct, is consistent with this Court's decisions, and does not conflict with any decision of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals' decision turns initially upon whether the contracting officer, Keefe, possessed the authority to enter into the express, oral, unilateral contract found by the trial court. Applying the long established principle that the government is not bound by the acts of its agents beyond the scope of their authority (Pet. App. 67), the court of appeals analyzed

the delegation of authority issued to Keefe and correctly concluded that it did not permit him to enter into a contract that was not accompanied by a prior written approval.

The terms of that delegation permit no other conclusion. After specifying the acts Keefe may take on behalf of DOE, his delegation expressly requires that "a separate prior written approval of any such action must be given by or concurred in by Mr. Keefe to accompany the action." Pet. App. 68, 111-112. The court of appeals correctly noted that Keefe was not authorized to act on behalf of DOE in disregard of this requirement.

"[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383 (1947); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921)(those purporting to contract with a government agent "must be held to have had notice of the limitations upon his authority").[3]

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[3] Petitioners suggest that they did not bear this obligation by citing a DOE regulation requiring contracting officers, upon their discovery that work is being performed pursuant to an unauthorized commitment, to inform contractors that they are performing at their own risk. Pet. 13 n.3. (Petitioners incorrectly cite 48 C.F.R. 901.602-3 (1995) as the regulation in effect at the appropriate time. In fact, the regulation then in effect was 48 C.F.R. 901.603-71(b)(1986)). This requirement does not relieve a contracting party of its burden to confirm that the agent with whom it is dealing is authorized to bind the government. Moreover, petitioners ignore the fact that, here, the trial court did not find that the contracting officer, Keefe, ever became aware that petitioners continued performing after February 24 in reliance upon any unauthorized DOE promise.

Indeed, when considered in its entirety, the cited regulation reemphasizes the principle that contracts entered into by unauthor-

Here, as the court of appeals stated, "[i]t appears evident that, if [petitioners] had examined [Keefe's] delegation of authority, [they] could not have reasonably believed [they] had entered into a binding contract with the government in the absence of the required written approval by [Keefe]." Pet. App. 70.

The court of appeals' holding accords with nearly 100 years of precedent in this Court, as well as that of the court of appeals and its predecessor, the United States Court of Claims, recognizing that the government is not bound by the acts of agents beyond the scope of their authority.[4]

Because the court of appeals correctly applied the binding precedent of this Court, petitioners' suggestion (Pet. 14-15) that its decision conflicts with the decision in *PacOrd, Inc.* v. *United States*, 139 F.3d 1320 (9th Cir.

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ized personnel are not binding, 48 C.F.R. 901.603-71(a) (1986), and also dictates elaborate requirements that must be met before a non-binding unauthorized agreement may be ratified by DOE. 48 C.F.R. 901.603-71(c) (1986). The record in this case does not contain evidence that those procedures were followed here.

[4] See, *e.g.*, *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 63 (1984); *Federal Crop Ins. Corp.*, 332 U.S. at 384; *United States* v. *California*, 332 U.S. 19, 40 (1947); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Sutton*, 256 U.S. at 579-580; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Trauma Serv. Group* v. *United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997); *Total Med. Management, Inc.* v. *United States*, 104 F.3d 1314, 1321 (Fed. Cir.), cert. denied, 118 S. Ct. 156 (1997); *Doe* v. *United States*, 100 F.3d 1576, 1584 (Fed. Cir. 1996); *CACI, Inc.* v. *Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993); *City of El Centro* v. *United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991); *American Gen. Leasing, Inc.* v. *United States*, 587 F.2d 54, 57-58 (Ct. Cl. 1978); *Correlated Dev. Corp.* v. *United States*, 556 F.2d 515, 525 (Ct. Cl. 1977); *Housing Corp. of America* v. *United States*, 468 F.2d 922, 925 (Ct. Cl. 1972); *Western Pa. Horological Inst., Inc.* v. *United States*, 146 Ct. Cl. 540, 546 (1959).

1998), is irrelevant. In fact, however, *PacOrd* does not conflict with the decision in this case.

PacOrd held that a government regulation specifically requiring express procurement contracts to be in writing does not bar the government's entry into an oral, implied-in-fact contract. The *PacOrd* court recognized that an issue separate from the one it decided was whether the government agent purporting to bind the government possessed the requisite authority to enter into the contract, 139 F.3d at 1322-1323, and accordingly the decision in *PacOrd* distinguished cases, such as this one, where the alleged contract would have been outside the agent's delegated authority. *Id.* at 1323.[5] Indeed, the *PacOrd* court specifically noted that in those cases "the government was not contractually bound because the government agent had no contracting authority or exceeded what authority he had." *Ibid.*[6]

Petitioners also ignore the fact that in this case it was not Keefe who was found to have formed a contract. Instead, the trial court found that Keefe ratified through his silence a contract otherwise offered by the oral representations of an unauthorized DOE official, Beckman. Pet. App. 14 n.27, 31, 49-57. The court of appeals correctly held that even if Keefe had been authorized to enter into the oral contract found by the trial court, the trial court did not find that Keefe was actually aware of Beckman's representations, which is a

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[5] Additionally, for the reasons stated in the *PacOrd* dissent, that decision is inconsistent with the precedent of this Court.

[6] Moreover, *PacOrd* stressed that its holding was limited to implied-in-fact contracts. It is thus distinguishable from this case where the purported contract found by the trial court was express. Pet. App. 160.

necessary element of ratification. *United States* v. *Beebe*, 180 U.S. 343, 354 (1901). Pet. App. 70-71. That fact-specific determination does not warrant this Court's review.

2. Petitioners also argue that even if the alleged oral contract was unauthorized, they were entitled to recover the value of services they allegedly provided to the government on a *quantum meruit* basis. Pet. 11-14. Petitioners suggest that the court of appeals' decision therefore conflicts with *Clark* v. *United States*, 95 U.S. 539 (1877), which allowed *quantum meruit* recovery.[7]

The court of appeals' decision does not address any *quantum meruit* claim because petitioners never made a timely alternative claim for *quantum meruit* recovery, nor do they suggest that they did. Before the trial court, other than one cryptic reference made in closing argument, petitioners chose to stand upon the claim for breach of contract damages resulting from the breach of an allegedly authorized contract. Neither petitioners' complaint, pre-trial motions, nor pre-trial statement of facts and law under Appendix G of the Rules of the United States Court of Federal Claims related or referred to a *quantum meruit* claim, even after the government clearly put into issue whether the alleged contract was authorized. Instead, petitioners sought only breach of contract damages measured by the portion of

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[7] Petitioners also claim that the decision of the Federal Circuit conflicts with *Inter-Island Transport Line, Inc.* v. *Government of the Virgin Islands*, 539 F.2d 322, 328-329 (3d Cir. 1976), and *Blake Construction Co.* v. *United States*, 296 F.2d 393, 396 (D.C. Cir. 1961). In those cases, the circuit court allowed *quantum meruit* recovery where plaintiff conferred some value on defendant under a contract made without authority. Our argument regarding the suggested conflict with *Clark* applies to the alleged conflict with these cases as well.

the contract price with Agrifuels that they did not receive, and claim they would have received had the government not breached the alleged contract. Pet. App. 157-159. Accordingly, the government was never put on notice of an alternative *quantum meruit* claim so that it could address what, if any, applicability a *quantum meruit* claim might have to this case, or submit evidence of the value to the government, if any, of services the government might have received from petitioners.[8]

Similarly, on appeal, petitioners did not argue that the trial court's judgment in their favor should be affirmed on the basis of any *quantum meruit* theory, or that if the court of appeals were to reverse that judgment the case should be remanded for additional proceedings based upon a *quantum meruit* claim.[9] In-

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[8] Whether the United States Court of Federal Claims even possesses jurisdiction to award *quantum meruit* recovery for the value of any performance conferred upon the government in association with a completely unauthorized contract is currently a pending issue before the court of appeals en banc. *AT&T* v. *United States*, 124 F.3d 1471, 1479-1480 (1997), withdrawn, 136 F.3d 793 (Fed. Cir. 1998) (order granting suggestion for rehearing en banc). Among other things, the government has contended in that appeal that *quantum meruit* is an implied-in-law recovery, *EWG Assocs.* v. *United States*, 231 Ct. Cl. 1028, 1030 (1982), and that it is outside of the jurisdiction of the Court of Federal Claims to award. *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423 (1996). *Clark* never analyzed the jurisdiction of the lower court over a *quantum meruit* claim.

[9] The only reference petitioners made to a *quantum meruit* theory appeared in their reply brief in support of their cross appeal. Petitioners thus waived in the court of appeals their argument regarding *quantum meruit*. See *Becton Dickison, & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief * * * is waived.").

stead, petitioners chose to defend the judgment solely on the breach of contract theory.

Accordingly, petitioners failed to assert a claim for *quantum meruit* recovery before both the trial court and the court of appeals. This Court does not ordinarily consider issues that were neither raised before nor considered by the lower courts. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners' failure to advance a *quantum meruit* claim below is not merely academic. The value to the government of any services the government may have received from petitioners' performance subsequent to Beckman's representation would present a question clearly distinct from the breach of contract damages actually sought by petitioners before the trial court. Those damages were derived from petitioners' contract price with Agrifuels for the construction work performed by petitioners after Beckman's representation, and petitioners' costs incurred in starting up the plant. Pet. App. 157-159.

Clearly, petitioners' contract price with Agrifuels, and their plant startup costs, do not dictate the value of their actions to the government, which only obtained value from the plant as collateral for its guarantees. As previously noted, after assuming control of the plant the government paid approximately $70 million in guarantees. However, the government only received approximately $3 million from its sale of the plant to offset its expenditure. Pet. App. 43. Any value to the government of petitioners' construction work between February 24 and April 7, 1987, is, at most, a fraction of that $3 million received in its sale. Additionally, petitioners' startup costs in serving Agrifuels did not necessarily

contribute anything in value to the $3 million the government received from its sale of the plant as scrap.

As noted, petitioners' failure timely to assert a *quantum meruit* claim denied the government any opportunity at trial to present evidence of the amount of value it actually may have received. Having failed upon the sole claim for breach of contract damages that they advanced below, petitioners should not be permitted to pursue an entirely new claim, requiring the presentation of different evidence than the claim that was tried, for the first time before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1999

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No. 98-697

In The

Supreme Court of the United States

October Term, 1998

HARBERT/LUMMUS AGRIFUELS PROJECTS, ET AL.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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ARGUMENT

The cases cited by Harbert/Lummus in the Petition for Writ of Certiorari are directly on point in this proceeding and demonstrate a clear conflict between and amongst the United States Courts of Appeal and the United States Supreme Court. The government's entire argument hinges on whether the government contracting officer ("CO") had the authority to enter into the subject agreement with Petitioners for completion of the Agrifuels Project. The government argues that the CO did not have or exercise such authority simply because the CO did not document the action in writing.[1] The government's argument that the CO lacked authority to bind the government is based on the CO's failure to execute a "prior written approval" for any such action, as required by the CO's delegation of authority (Pet. App. at 111-12). In sum, the government's sole objection to the existence of an authorized contract to continue to guarantee funding for the Agrifuels Project is the lack of a writing.

The cases cited by Petitioners support the proposition that the mere lack of a writing, even if required by statute, is an insufficient basis for denying the formation of an implied-in-fact contract where one party has performed in reliance on the government's oral promise and

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[1] The government asserts the lack of a writing as the basis for rejecting contract formation as well as contract ratification. Contrary to the implication of the government, the trial court found that the CO "adopted" the promise in question, which was made in his presence by the DOE programming official. (Pet. App. at 49.) The trial court's findings of fact are not disputed. (*See* Pet. App. at 67.) As discussed in greater detail below, the *Clark* line of cases establish that recovery on an implied-in-fact contract is available notwithstanding the absence of a written contract or ratification.

the government has accepted the benefits of that performance. Pursuant to long-standing case precedent established by the United States Supreme Court and followed by other federal courts, the government may not accept and retain the benefits of a contract, yet avoid paying for those benefits because the otherwise valid contract is deemed unauthorized or unenforceable on account of the government's failure to make a writing documenting or approving its promise to pay. Contrary to the government's assertions in this proceeding, *quantum meruit* is not argued as a separate theory of recovery, but rather as the measure of damages that have been awarded where a contractor wholly or partially performs its end of an oral agreement with the federal government, and the government thereafter reneges on its promise.

I. *CLARK V. UNITED STATES* HOLDS THAT AN IMPLIED-IN-FACT CONTRACT WARRANTS RECOVERY OF THE VALUE OF THE BENEFIT CONFERRED

In *Clark v. United States*, 95 U.S. 539 (1877), the Supreme Court of the United States recognized that even though a government contract was not in writing as required by an Act of Congress,[2] a party is entitled to recover the fair value of the property or services it conferred on the government by virtue of its performance of the oral agreement.

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[2] The Act of June 2, 1862, "An Act to Prevent and Punish Fraud on the Part of Officers Intrusted with the Making of Contracts for the Government," required that all contracts with the United States be in writing and made it "unlawful for contracting officers to make contracts in any other way than by writing signed by the parties." *Clark*, 95 U.S. at 541-42.

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

Clark, 95 U.S. at 542. In its brief, the government mischaracterizes *Clark* as an "implied-in-law" contract case. (*See* Gov. Br. at 11-14 & n.8.) Contrary to the government's suggestion, the Supreme Court did *not* hold that Clark's recovery was based upon an implied-in-law contract. Rather, the facts in *Clark*, as in the case *sub judice*, established a "parol contract," which is synonymous with an "implied-in-fact contract."[3] The Court's reference to *quantum meruit* merely established that the measure of

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[3] Other courts have interpreted *Clark* to stand for the imposition of liability based upon an implied-in-fact contract. *See, e.g., PacOrd, Inc. v. United States*, 139 F.3d 1320, 1322 n.1 (9th Cir. 1998) ("[*Clark v. United States*, 95 U.S. 539 (1877)] recogniz[ed] that although a statute requiring a writing precluded recovery based completely on an express oral contract, recovery was available on an 'implied contract.' "); *Narva Harris Constr. Corp. v. United States*, 574 F.2d 508, 510-12 (Ct. Cl. 1978) ("The Supreme Court, in discussing a statutory predecessor to § 200, recognized the possibility of recovery outside of the oral express contract which had not been reduced to writing. In *Clark v. United States*, 10 Ct. Cl. 604 (1874), *rev'd*, 95 U.S. 539 (1877), the Court of Claims had taken exactly the position which the Government now asserts and had denied recovery to a claimant against the Government on an oral contract. The Supreme Court, though recognizing that application of the statute was mandatory insofar as it precluded recovery based solely on an alleged express oral contract, reversed this court and allowed recovery on 'an implied contract for a *quantum meruit*.' Since that early interpretation . . . this court has often allowed recovery on an implied-in-fact contract.") (citation omitted).

damages available to Clark was the value of the goods or services rendered, which was the measure applied by the Court of Federal Claims in this case.

Here, as in *Clark*, the government argues a lack of authority of the contracting officer or government official to enter into a binding government contract based solely on the lack of a writing. (*See* Gov. Br. at 7-9.) In the present case, the Federal Circuit accepted the government's argument and reversed the trial court by narrowly focusing on the issue whether the government's promise or ratification thereof was documented in writing in accordance with delegated authority under the BEA. (*See* Gov. Br. at 7-9.) However, as discussed more fully in the Petition, the appellate court's decision directly conflicts with the Supreme Court precedent established in *Clark*. The *Clark* Court held that despite noncompliance with a statutory writing requirement, an oral promise made by the government that induces the promisee to perform entitles the promisee to compensation for the value of the benefit conferred. 95 U.S. at 542.

The relevance of the *Clark* Court's holding to this case is its refusal to characterize the absence of a writing as a limitation on the CO's authority to create an obligation for the federal government, and its characterization of the government's promise as an implied-in-fact contract, such as that found by the court in this case. In the present case, the trial court's uncontroverted findings of fact establish that an implied-in-fact contract was created when Harbert/Lummus was induced to and, in fact, did perform certain construction services in reliance on the government's oral promise. On these grounds, the trial court correctly ordered the government to compensate Harbert/Lummus for the value of the benefit conferred.

The government's suggestion that this Court may not consider *Clark* in ruling on the instant request for writ of certiorari because Petitioners have not stated a claim for *quantum meruit* is unfounded.[4] (*See* Gov. Br. at 11-14.) Petitioners asserted a claim for breach of an implied-in-fact contract in their initial complaint filed with the Court of Federal Claims. (Pet. App. at 1.) As indicated above, and as evidenced by the trial court's findings of fact,

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[4] See *Narva Harris* for an explanation of the difference between "implied-in-fact" and "implied-in-law" contracts and for a discussion on the implied-in-fact contract theory of recovery. 574 F.2d at 510-11 & n.6 ("Were we to subscribe to [the Government's argument], we would be facing the farcical situation of having the Government, in any situation where it was defending against an implied-in-fact contract claim, attempting to prove that there was, in actuality, an express oral contract which it had breached. Then, citing § 200 and applicable regulations, the Government could escape any liability whatsoever. Even more importantly, such an interpretation would also, in practicality, have the effect of eliminating recovery against the Government in almost all cases where claims are based on implied-in-fact contract or *quantum meruit*. In almost all such cases, there is some sort of oral representation on the part of some Government agent. Although the party seeking to recover from the Government may not rely on the oral representation, and may rely totally on other, independent facts to establish the presence of an implied-in-fact contract or to recover in *quantum meruit*, the Government now seeks to make the mere existence of the oral representation, characterized as an oral express contract not reduced to writing, sufficient to compel this court to close its eyes to all other surrounding facts. Clearly such an expansive interpretation of § 200 is unacceptable. . . . The failure, for whatever reason, of an attempt at an express contract be it written or oral, is not enough, in itself, to deprive a party of a recovery for breach where sufficient additional facts exist for the court to infer the 'meeting of the minds' necessary to separate an implied-in-fact from a pure implied-in-law contract.") (citations omitted).

Petitioners have established that the circumstances of this case prove the formation of an implied-in-fact contract, and that Harbert/Lummus is entitled to recover the value of the services rendered. Moreover, this Court addressed and disposed of this very same argument when proffered by the government in the *Clark* case:

> If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

95 U.S. at 543.

Finally, the government's assertion that it has not had any opportunity to present evidence as to the value of the services rendered by Harbert/Lummus is likewise unsupportable. (*See* Gov. Br. at 13-14.) In its brief, the government asserts that "the value to the government of any services the government may have received from petitioners' performance" somehow equates to the value of the ethanol plant constructed, taking into consideration its end use or disposition by the government. (*See* Gov. Br. at 13.) Contrary to the government's assertion, the measure of recovery on such an implied-in-fact contract is not the value of the benefit ultimately realized by the government, but rather the fair market value of the benefit actually conferred.[5] In other words, the value of

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[5] *See Martin v. Campanaro et al.* for a discussion on the measure of damages available in "implied-in-fact" versus "implied-in-law" contract cases. 156 F.2d 127, 130 & n.5 (2d Cir. 1946) ("**We think that here there was a contract 'implied-in-fact' to pay the reasonable value of the services.**") (citing

Petitioners' performance is not to be measured by the value to the government of the plant or project on which it worked, but rather by the fair market value of the construction services, including material and labor, actually supplied.

Absent a finding of fraud, the contract price constitutes substantial evidence, and arguably an admission by the government, of the value of the services rendered.[6] In

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Costigan, Implied-In-Fact Contracts, 33 Harv. Law Rev. 376, 387 (1920) ("See Costigan for the suggestion that both (1) 'meeting of the minds implied-in-fact contracts' and 'no-meeting-of-the-minds implied-in-fact contracts' are to be distinguished from (2) quasi contracts by the difference in the respective measures of damages; he says that in (1) the damages are on the contract basis, i.e., the loss to the plaintiff, but that in (2) the damages are measured by the unjust enrichment of, or benefit to, the defendant.") (emphasis added) (citation omitted). *See also Williams v. United States*, 127 F.Supp. 617, 623 (Ct. Cl. 1955) ("The sole defense of the [government] is that since [the government agent] was not a contracting officer with full authority to bind the Government in the fullest contractual sense, the plaintiffs cannot recover on this item. . . . It seems incredible that [the contracting officer] did not know all about the agreement and by his inaction ratify it. Certainly he did not repudiate the agreement, and he did not appear as a witness. The plaintiffs carried out their part of the agreement for which the Government received the benefit. **We feel that there then arose an implied contract under which the defendant was obligated to pay the value of the services rendered by the plaintiffs. Recovery is accordingly allowable for this item in the amount deducted under the contract.**") (emphasis added).

[6] *See Clark*, 95 U.S. at 543 ("This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose."); *cf. Crocker v. United States*, 240 U.S. 74, 82 (1916) ("The insistence proceeds upon the theory that the contract

fact, use of the contract price as the mechanism for measuring the value of the services rendered was agreed on by the parties in the proceedings before the trial court: "The parties agree that it is appropriate to utilize the monthly Construction Monitor Progress Report as a measure of the value of work performed." (Pet. App. at 157.) Both parties had an opportunity to put on evidence as to the value of Harbert/Lummus' construction services before the Court of Federal Claims. The trial court awarded $2,870,768, plus interest, based on the actual work performed by Petitioners after, and in reliance on, the government's promise, using the milestone and payment schedule contained in the construction contract. (Pet. App. at 157-61.) Therefore, the trial court did in fact apply the measure of damages the *Clark* Court said to apply in a case such as this.

II. *PACORD, INC. V. UNITED STATES* HOLDS THAT A GOVERNMENT PROMISE IS NOT INVALID OR UNAUTHORIZED FOR MERE LACK OF A WRITING

The government's view that *PacOrd, Inc. v. United States*, 139 F.3d 1320 (9th Cir. 1998), is inapposite because it is based strictly on the lack of a writing is curious given that the lack of a writing is the crux of the government's defense in the present case. (*See* Gov. Br. at 7-10.) The government's argument strictly relies on the absence of a writing documenting or ratifying the oral agreement

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price was in the nature of an admission by the government of the value of the [goods]. However this might be in other circumstances, it is wholly inadmissible here, for the fraud with which the contract was tainted completely discredited the contract price, and prevented it from being treated as an admission of the value by the government.").

between Petitioners and the government as the basis for finding a lack of authority to contract. (*See* Gov. Br. at 7-9.) The government attempts to distinguish the facts of the instant case from those in *PacOrd* by referencing the very same cases the Ninth Circuit found inapposite. (*See* Gov. Br. at 10.) The cases cited by the government are cases in which "the government was not contractually bound because the government agent had no contracting authority or exceeded what authority he had," or cases that "did not involve implied-in-fact contracts." *PacOrd*, 139 F.3d at 1323. The government officials in those cases exceeded the scope of their contracting authority by engaging in transactions for which they had no such authority, not by merely failing to document authorized acts in writing. *See id.* (distinguishing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Edwards v. United States*, 22 Cl. Ct. 411 (1991); *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110 (9th Cir. 1994); *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077 (Fed. Cir. 1989)).

In *PacOrd*, the Ninth Circuit held that an oral promise by the government to guarantee payment to a subcontractor was not necessarily invalid and unenforceable merely because the government failed to reduce the promise to writing as required by the governing statute or regulation. 139 F.3d at 1322-23. The *PacOrd* court found that the oral promise made by a government contracting officer to PacOrd, the subcontractor, that the government would guarantee payment by the contractor may have created an enforceable implied-in-fact contract, despite noncompliance with the writing requirement in the Federal Acquisition Regulation ("FAR"). *Id.* The Ninth Circuit observed:

> Implied-in-fact contracts with the government have been enforced despite statutory or regulatory requirements that contracts be in writing. . . . The present case is analogous to Narva Harris. In both cases the government made assurances to a service provider in order to secure the desired performance. In neither case did the parties execute written contracts as required. And, PacOrd, like Narva Harris Construction, proceeded and completed its work in reliance on the government's assurances. Thus, PacOrd, like Narva Harris Construction, should be permitted to establish at trial, the existence of an implied-in-fact contract. If PacOrd can do so, recovery is not barred by the FAR requirement that the contract must be in writing.

Id. (quoting *Narva Harris Constr. Corp. v. United States*, 574 F.2d 508, 511 (Ct. Cl. 1978)).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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